

(1973) 04 MAD CK 0023
In the Madras High Court

K.A. Kannappa Chetti

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 19-04-1973

Acts Referred:

Constitution of India, 1950 — Article 39(b), 39(c)

Citation : (1973) ILR (Mad) 517 : (1973) 2 MLJ 212

Hon'ble Judges : V.V. Raghavan, J

Bench : Division Bench

Judgement

V.V. Raghavan, J.—Out of a large number of writ petitions questioning the validity of the Tamil Nadu Ordinance of 1973, the above writ petitions typifying the two classes of persons affected, viz., one by a bus operator or a permit holder and the other by the financier under a hire-purchase agreement, have been posted for hearing. We shall take up W.P. No. 123 of 1973 filed "by a bus operator or a permit holder and W.P. No. 876 of 1973 and W.P. No. 1486 of 1973 filed by leading financiers in the State of Madras by way of sample. All other writ petitions are more or less of the same pattern falling under one or the other of the above classifications. Before dealing with the allegations contained in each of the above groups, we shall briefly refer to the salient features of Tamil Nadu Ordinance (I of 1973), hereinafter referred to as the Ordinance, in order to appreciate the attack on its various provisions.

2. On 12th January, 1973 the Governor of Tamil Nadu promulgated the Tamil Nadu Ordinance (No. I of 1973). The said Ordinance was published in the Tamil Nadu Gazette, dated 14th January, 1973, and according to the provisions of the said Ordinance, Clauses 1, 14, 15, 16 and 17 came into force in the entire State of Tamil Nadu from 14th January, 1973, and the other provisions therein are stated to come into force on notification on different dates as may be appointed for different districts in the State. Clause (2) of the Ordinance declares that the Ordinance is promulgated for giving effect to the State policy towards securing the principles specified in Article 39 (6) of the Constitution and the acquisition of

stage carriages and contract carriages and that the acquisition of stage carriages will commence with the district wherein comparatively fewer number of stage carriages are in operation and that it will be extended to other districts specified in the schedule within a period of five years. On and from the notified date the stage carriages and contract carriages in the State of Tamil Nadu owned or operated by stage carriage operators or contract carriage operators shall vest in the Government along with the permits and shall be freed and discharged from any trust, obligation, mortgage, charge, lien, hire-purchase agreement or otherwise and all other encumbrances or transactions affecting such stage carriages or contract carriages. Clause 5 of the Ordinance enunciates the principles and methods of determining the amount for the acquired property. Clause 14 bars the filing of applications for fresh permit or for renewal of existing permit for running any stage carriage or contract carriage. Clause 15 places an embargo upon persons from transferring by sale or gift of any stage carriage or contract carriage liable to be acquired under the Ordinance excepting in favour of the Government or a Corporation or a company owned by the Government. It further provides that where any transfer is made, by way of sale in favour of the Government, the price to be paid shall be calculated in accordance with the principles for determining the amount under this Ordinance for such property. Clause 16 relates to grant of temporary permits to the operator. It provides that any stage carriage operator or contract carriage operator running any stage carriage or contract carriage in this State shall be entitled to obtain temporary permits under the Motor Vehicles Act in respect of any stage carriage, or contract carriage liable to be acquired under this Ordinance and that the temporary permit shall be for a period of four months in the first instance, which will be extended for further periods of four months at a time, until the stage carriage or contract carriage is transferred to the corporation or company or the State Transport Department of the Government. Clause 17 states that every transfer of any stage carriage liable to be acquired under the Ordinance in contravention of Clause 15 shall be void. Section 28 bars the jurisdiction of the civil Court in respect of any matter which the Government is empowered by or under this Ordinance to determine, and provides that no injunction shall be granted by any Court. Clause 31 is the overriding provision. The First Schedule enunciates the principles of determination of compensation. The Second Schedule gives the number of buses operating in the Tamil Nadu, districtwise. The Explanatory Statement accompanying the Ordinance seeks to justify the promulgation of the Ordinance, which we set out below : -

Having regard to the directive principles of State Policy embodied in Clauses (b) and (c) of Article 39 of the Constitution of India that the State should direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production, to the common detriment, the Government of Tamil Nadu consider it expedient and necessary to nationalise the passenger

transportation system in the State in stages. The Government have decided to complete the process of Nationalisation within five years.

(2) The Government are convinced that development of a vital sector like passenger transportation on sound lines having regard to public interest cannot be done under the leadership of private sector working merely for profits and expending only in sectors where profits are available. The Government recognise the need for connecting all the villages in the State to the passenger transportation system so that our rural people are free to move about and reach marketing and population centres without undergoing undue hardship. In fact, without an expanding net-work of transportation facilities in the areas of social consumption Government's programme of social welfare in the fields such as family planning, health, education and house-building cannot be successfully implemented. In the early stages it would be necessary to run some passenger transport services in these areas which may not be paying immediately and this would be possible only under public ownership.

(3) The Government have also observed that there is wasteful competition in running passenger transportation services in certain sectors, whether it be by competition among private operators or competition between the private operators and Government transportation systems. Competition in all these cases have resulted in overall wastage of resources from the point of view of the national economy. The Government have, therefore, come to the conclusion that if passenger transport were to run on efficient and economic lines for the benefit of the community as a whole, it will have to be nationalised.

(4) Operation of the contract carriages-have led to a lot of abuse. Many of the contract carriages have been functioning like stage carriages resulting in unhealthy competition. It has, therefore, become necessary to nationalise them also.

(5) The Government also recognise that existing legislations, Central as well as State, are inadequate to speed up the-pace of nationalisation. To achieve the objectives of nationalising the entire passenger transportation system in a phased manner during the next five years, it has, therefore, been decided to bring in a more comprehensive legislation which would over-ride the provisions of all the existing legislation in the field and would enable the Government to achieve total nationalisation of passenger transportation services over a period of five years to secure the constitutional objectives enshrined in Clauses (b) and (c) of Article 39 of the Constitution of India.

(6) As the Legislature is not in session, it has become necessary to promulgate an Ordinance for this purpose.

3. We shall now take up the main grounds of attack on the above Ordinance in W.P. No. 123 of 1973 filed by an operator or a permit holder. They are as follows : (1) There are no circumstances necessary for the Governor to issue the Ordinance as the State Legislature was in session in December, 1972 and was

prorogued on 20th December, 1972 to meet again in February, 1973. The satisfaction of the Governor that circumstances exist for issue of the Ordinance is open for scrutiny by the Court. (2) The Governor is required to get instructions from the President prior to the promulgation of the Ordinance, and on what materials such instructions were obtained is not known. (3) Chapter IV-A of the Motor Vehicles Act relates to the law relating to stage carriage permits-and nationalisation. But, the provisions therein do not provide for taking over of the motor vehicles themselves. The impugned Ordinance seeks to take over the motor vehicles with equipments, spares, etc. Therefore, the provisions of the Ordinance require the assent of the President under Article 254 (2) and the materials which were placed before the President for obtaining his assent are necessary to be produced to ascertain whether every repugnancy between the provisions in the impugned Ordinance and Chapter IV-A was brought to his notice, and what reasons the State Government advanced for varying the provisions of the Central enactment. The requirement of the President's assent under Article 254 (2) of the Constitution of India relates to the legislative competency. But the provisions of the Ordinance varying the Union law will have to be tested both under Articles 14 and 19 with regard to the difference in the provisions for compensation under Article 31 (3). The provisions of the Ordinance are void the law failing under Article 13 being inconsistent with and in violation of Articles 14, 19 and 31. (4) The declaration in the Ordinance under Clause 2 that the policy of the Ordinance is to secure the principles specified in Article 39 (b) does not give a blanket protection under Article 31-C (25th Amendment) and it is open to the Court to scrutinise the provisions of the impugned Ordinance and ascertain whether Article 39 (b) or 39 (c) is attracted at all. In other words, what Article 31-C prohibits is only an attack that the provisions of the impugned Ordinance take away or abridge any of the rights conferred under Articles 14, 19 or 31. But the question whether Article 39 (b) or 39 (c) is attracted in a given case is subject to judicial scrutiny. (5) The Ordinance providing for taking over of stage carriages operated by an operator as well as all his rights and interest in lands, buildings, workshops, stores, etc., is an unreasonable and unwarranted restriction on operators of motor vehicles in the State of Tamil Nadu. Further, the compensation provided is far below the market price and Clause 6 providing for compensation is liable to be struck down. (6) The Motor Vehicles Act, 1939, is a Central enactment. The legislative entry thereto falls under the concurrent list. The Central enactment contains standard reasonable-restrictions on stage carriage operators and any further restrictions imposed by the impugned Ordinance has, to be therefore tested for reasonableness under Article 19, and there is no special reason why in a concurrent subject, the very object of which list is to secure an uniform law throughout the country there should be more severe restrictions on Tamil Nadu operators than on those in any other part of India. This results in the Ordinance contravening Article 14, or to put it in another way the test should be whether these provisions do not contravene Article 14 if the entire Ordinance had been included in the main Central Act itself. (7) Clause 4 of the Ordinance, in cancelling all mortgages, charges and hire-

purchase agreements entered into by the operators is void. Further, Clause (2) of the Ordinance fixing different dates for different districts is arbitrary and unreasonable. The provisions of Clause (4) of the Ordinance further violate the rules of natural justice. The provisions of Clause (6) and the First Schedule of the Ordinance are arbitrary and unreasonable since they provide for the acquisition of assets without meeting the liabilities incurred for acquiring the property. (8) Clause 14 of the Ordinance is arbitrary and not in the interests of the public. Clauses 15 and 17 in so far as they restrict the fundamental rights of the petitioner under Article 19 and for vesting the stage carriages and other properties in the State, irrespective of the rights of the owner of the property are unreasonable. Further, the provisions of the Ordinance is negating the grant of fresh permits or renewal of the existing permits and restraining the operator's right to transfer by way of sale, gift, etc., of a stage carriage liable to be acquired under this Ordinance affect the fundamental rights of the operators to own and dispose of the property. (9) The provisions of Clauses 20 and 21 are illegal, arbitrary and unworkable. (10) On the aforesaid contentions, the petitioner prayed for the issue of a writ of mandamus restraining the State of Tamil Nadu from giving effect to the provisions of the Ordinance.

4. Before we take up W.P. No. 876 of 1973 filed by a leading financing company, we shall deal with the position of the bus operators in Tamil Nadu and how they put a bus on the road after a permit is granted. Most of the permit holders have not the necessary finance to purchase motor vehicles for cash. They usually seek aid from financiers and enter into hire-purchase agreements with them as they are unable to purchase motor vehicles and put them immediately on the road soon after the grant of permits even before they pay in full the price of the vehicle.

5. In the State of Tamil Nadu, the financing of commercial motor vehicles has always been largely by hire-purchase agreements. There are 500 to 600 hire-purchase financiers in Tamil Nadu and the petitioner is a leading financing company and the commercial finances of the petitioner would be in the region of 25 to 30 crores of rupees. There are 8,421 vehicles listed in Schedule II of the Ordinance, and nearly 90 per cent, of the vehicles excluding the Government-owned vehicles are financed under hire-purchase agreements, and the amount outstanding on transport vehicles would be roughly 15 crores of rupees. The financiers deposit the hire-purchase agreements with leading banks and raise funds.

6. We shall now set out the grounds on which the financiers under hire-purchase agreements seek to attack the Ordinance. (1) The Ordinance completely disregards the petitioner's ownership of the vehicle, as under the terms of the hire-purchase agreements, the financier, namely, the petitioner is the owner, and until the last instalment of the payment is made, the operator or permit-holder does not become the owner of the vehicle. Thus the main incident of hire-purchase agreement has been totally ignored under the Ordinance in question.

(2) The vesting section expressly providing that the vehicles vest in the Government freed from all encumbrances, mortgages, charges, lien, hire-purchase agreement or otherwise, leaves the hire-purchaser with no remedy. Clause (2) of the Ordinance defines, "a person interested", in relation to any acquired property as including the stage carriage operator, and any other person who is affected by the vesting of the acquired property claiming or entitled to claim an interest in the amount. Clause 6 (1) providing that every person interested shall be entitled to receive such amount as may be determined in the manner set out as specified in the B Schedule, does not appear to apply to persons like financiers who have advanced monies on the security of the vehicles and who under the agreement are the owners of the vehicles. (3) The Ordinance does not comply with Article 31 (2) of the Constitution by providing for direct payment to the petitioner as owner resulting in destroying the petitioner's security which is beyond the competence of the Tamil Nadu State Legislature. (4) No compensation having been provided to the hire-purchaser-financier, who is the owner, according to general law, and also under the law of hire-purchase, the Ordinance is void for want of legislative competence as well as for non-making of any provision for payment to the petitioner. (5) The assent under Article 31 (3), if given at all, has been given only under some misapprehension in the correspondence between the State Government and the Union Government about the persons really affected, and as to how they are affected by the Ordinance. (6) The assent given by the President under Article 31 (3) is wholly void. (7) Article 39 (b) is wholly inapplicable to the facts of the present case, as Motor Vehicles, do not fall under the expression "material resources" of the community. (8) Article 39 (b) seeks to secure and distribute the ownership and control of the material resources of the community, so as to subserve to the common good and the monopoly acquisition of such stage carriages by the Government is the very opposite of distribution. (9) Clause 31 of the Ordinance is wholly beyond the legislative competency of the State of Tamil Nadu Legislature as the Tamil Nadu Legislature cannot override the Central enactments, such as the Hire Purchase Act, the Contract Act, the Transfer of Property Act and other Central enactments. (10) The impugned law requires the assent under Article 254 (2) of the Constitution. The legislative head under which the law relating to motor vehicles is indicated in Entry 35 of List III of the Seventh Schedule and Entry 43 in the same list relates to acquisition and requisition. Under Article 254 (2) the President can make a law valid as to the Madras State, only in respect of repugnancy to a Central law relating to mechanically propelled vehicles or acquisition of the same, that it to say, the same matter in the concurrent list in the words of Article 254 (2). The President's assent cannot, therefore, have any effect on repugnancy to any law other than the Motor Vehicles Act. (11) The Tamil Nadu Legislature has no legislative competence to make a law abrogating Central enactments and even if the President gives his assent under Article 254 (2), the provisions of the Ordinance are wholly void as violative of Articles 14 and 19. (12) The financiers were not affected when nationalisation was done in Madras under Chapter IV-A,

because the vehicle was left untouched and their security remained intact. Clauses 14, 15, 16 and 17 of the impugned Ordinance affect their rights seriously as their right to recover their money advanced under the hire-purchase agreement by sale of the seized vehicle for default in payment of monthly instalments is lost. (13) The State Legislature is incompetent to make a law abrogating the Central Acts even if assent is given under Article 254(2). (14) The provisions of the impugned ordinance regarding compensation in so far as the petitioner is concerned are wholly unjustified. After prior statutory deductions, they will not get the amount due to them under the hire-purchase agreement even assuming that they are entitled to partake in the compensation amount. (15) Their true status as owners of the vehicles has been ignored and they are not mortgagees or chargeholders, and as such they have been deprived of their security without compensation. The hire-purchase agreements which are usually deposited with banks to raise finance and the securities held by such banks are also seriously affected. (16) In W.P. No. 876 of 1973 a supplemental affidavit was filed to the effect that the acquisition of stage carriages under the Ordinance is not for a public purpose within the meaning of Article 31 (2) and that no question of concentration of wealth within the meaning of Article 39 (c) arose. In the case of permit-holders of buses, similar applications were filed in W.P. No. 123 of 1973, and their stand in the other petitions are the same.

7. The State Government filed a counter-affidavit in W.P. No. 123 of 1973 and their stand in the other petitions are the same. We shall now-set out the stand taken by the State Government

(1) The object and aim of the Ordinances is clearly set out in the explanatory memorandum appended to the Ordinance. The contention that the provisions of the-Ordinance are violative of the Constitution was denied.

(2) The Governor is competent to. promulgate the Ordinance in question under Article 213 of the Constitution and the contentions of the petitioner based on Articles 213 (3),-131 (c), (b) and 254 ("2) are all misconceived and untenable. The satisfaction of the Governor under the constitutional system of Government is arrived at on the advice of the Council of Ministers and is subjective, and such subjective satisfaction of the Governor, who is the Constitutional Head of the State, cannot be questioned or canvassed under Article 226 of the Constitution.

(3) It is unnecessary to list out the correspondence that passed between the State Government and the Union Government relating to the obtaining of the President's instructions or President's assent and there is no justification to probe into or scrutinise the details of the letters seeking instructions and the reply of the Government of India, with reference to the same for determining the points at issue. A copy of the Ordinance was sent by the State Government and the-requirements of law have been satisfied.

(4) The provisions of the Ordinance are designed to acquire the passenger transport divisions and thereby nationalise the passenger transportation system

in the State, and is just and reasonable in the interests of general public and consequently saved under Article 19 (6) of the Constitution of India. The nationalisation or complete acquisition of stage carriages and vesting them in a corporation or company of the State Transport Department or the Government also falls under Article 39 (b) of the Constitution. There is no justification for the contention that Article 39 (b) relates to-the distribution of natural resources only and that nationalisation of stage carriages and vesting them in a corporation or a company or a Transport Department also falls under Article 39 (b) and that the policy statement made in Clause (2) of the impugned Ordinance is correct.

(5) Clause 31 has not the effect of amending the other laws referred to therein, but to exclude their operation so far as the subject matter covered by the Ordinance is concerned and make the Ordinance self-contained with reference to the subject matter in question. Clause 31 of the Ordinance is, therefore, well within the competency of the State Legislature. The contention that the Tamil Nadu Legislature does not have the Legislative competence to make a law abrogating the Central Act, that the assent given under Article 254 (2) is void as violative of Articles 14, 19 and 31 and that the State law in terms of the Ordinance cannot have higher validity than the law made by Parliament itself to the same effect is wholly misconceived and devoid of merit.

(6) The financier is a person interested in the amount and will be awarded a compensation under the Ordinance to come out of the amount representing the acquired property.

(7) Clauses 9 and 10 (3) of the Ordinance provide adequate safeguards protecting the rights of secured creditors, and financiers who advanced monies under the hire purchase agreement fall under the category of secured creditors, and as such the financier's fears are unfounded and that the judgment of the High Court in "Manasuba and Company's case (1969) 1 C. L.J. 5, must be confined to its facts and cannot stand in the way of the State acquiring the property in question and that the contention of the petitioner relating to hire-purchase agreements are expressed too widely in the said judgment.

(8) The contention that the impugned Ordinance deprives the Banks with whom the hire-purchase agreements are deposited and funds raised on their security is wrong.

(9) The principles laid down in the Ordinance for determination of the compensation payable for the acquired property do not offend any provision in the Constitution.

(10) None of the provisions contained in the Ordinance in question is violative of Articles 14, 19 and 31 (2).

(11) The provisions contained in Clauses 14, 15, 16, and 17 are just, reasonable and valid and they are in public interests.

(12) In any event, Article 358 being in force, the operation of Article 19 is

suspended and therefore, the petitioners are precluded from contending that Article 19 has been contravened.

8. A common counter-affidavit was filed on behalf of the Union of India, who is the second respondent. In denying the allegations as to fraud and misrepresentation in securing the President's assent, it was contended that the required instructions were sought for and given properly and validity, and that once the factum of the grant of the assent or instructions is established, there cannot be any challenge to the basis or the factum of the grant or the manner in which the assent was processed or obtained.

9. The instructions of the President were sought for after drawing the specific attention of the President to Article 30 (2) and Article 254 (2) as also to Clauses (b) and (c) of Article 39 of the Constitution and the instructions were given by the President, as required under Article 213 (1) including that required under Article 31-C. The Ordinance being one passed in implementation of the Directive Principles of State policy contained in Article 39 (b) and (c) of the Constitution, it is not open to the Writ Petitioner to question its constitutionality by reference to Articles 14, 19 and 31 of the Constitution.

10. A reply affidavit was filed. Meanwhile, the Government Pleader would appear to have furnished to the Counsel for the petitioners copy of the letter, dated 21st November, 1972 from the State Government to the Secretary to the Government of India, Ministry of Home Affairs, New Delhi, enclosing a copy of the Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Ordinance, 1972, which was to be promulgated by the Governor and the request of the State Government for issue of instructions from the President under the proviso to Article 213 (1) of the Constitution, and a copy of the letter, dated 27th December, 1972 from the Government of India, Ministry of Home Affairs to the State Government, conveying the approval of the President for the promulgation of the Ordinance by the Governor of Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Ordinance, 1973. In the reply affidavit, the petitioner complained that the assent obtained by the State Government was by misrepresentation both by suggesting what is false and by suppressing the truth and that it amounted to fraud in law and that consequently the assent given in the letter, dated 27th December, 1972, is void and that it is not an assent at all. In regard to the said assent letter, the petitioner made detailed submissions contending that the omission to refer to Article 31 (c) or its proviso, or Article 39, Clause (6) or (c) was deliberately made and the Government cannot take the said assent as one covering Article 31 (c) and that it would be unconstitutional and beyond the power of the Union Government to give its assent under Clause (3) of Article 31 without examining the provisions as to compensation and satisfying itself that either it is adequate, or if what is fixed is an amount, or the principles for arriving at an amount the provisions are just and proper in its opinion. Further, the petitioner contended that in inviting assent under Article 31 (2) on the basis of the letter, dated 24th November, 1972, suppressing the basic

fact that in the State of Tamil Nadu in more than 75 per cent of stage carriages, hire-purchase financiers are the owners and the operators are only hirers, and that consequently, the so-called assent obtained under Article 31 (2) was by misrepresentation, and that consequently, the assent is void. The petitioner further contended that there was deliberate misrepresentation of the scope of clause 31 of the Ordinance and the omission would refer to hire-purchase financiers and to the banks as to their normal rights and the right which any operator enjoys throughout India under the Motor Vehicles Act, which the Ordinance denies to operators in Tamil Nadu. The further attack by the petitioner was that Article 39 (C) was not ordinarily referred to in the request for instructions under Article 213 (1) from the President.

11. The petitioner's further contention was that the material resources referred to in Article 39 (b) will only mean the natural resources and cannot include stage carriages. Clause (c) of Article 39 is absolutely irrelevant and has no application to this case inasmuch as the Ordinance indiscriminately takes away the vehicle from a person having a single stage carriage point wherein there can be no concentration of wealth at all. On the other hand, such operators are invariably found to be debtors. A compulsory acquisition of stage carriages is repugnant to Article 19 (1) (g) and further the provision is void as the acquisition is not for a public purpose falling under Article 31 (1). Lastly, the petitioner contended that on a proper construction of Article 358, the Emergency Proclamation issued in the wake of the Chinese aggression ceased to have operation long ago, and that the fundamental rights of the petitioner cannot be curtailed on that score.

12. We shall now set out the various questions arising for determination in these writ petitions. (1) The impugned Ordinance proceeds on a total misconception as to the rights of a financier under a hire-purchase agreement, inasmuch as the financier is the real owner of the vehicles and his rights have been totally ignored and consequently the provisions of the Ordinance are void and inoperative. (2) The Ordinance in so far as it treats the hirer (operator) under a hire-purchase agreement as owner of stage carriages is basically erroneous, in fact and in law. Further, no compensation has been specifically provided for acquiring the right of such financiers under the hire-purchase agreements, and on this ground also the Ordinance cannot be valid. (3) Even on the assumption that the 25th Amendment of the Constitution is valid, the acquisition of stage carriages along with the workshop materials, garages, offices, furniture etc., do not fall under the expression "material resources of the community" in Article 39 (b). Further, under no circumstances can the ownership and control of motor vehicles not owned by the community, but by individuals be taken and distributed on the basis that it would subserve the common good. Factually the motor vehicles are not going to be distributed in order to subserve the common good, and therefore, Article 39 (b) cannot be invoked under any circumstances. (4) There is no concentration of wealth and means of production in the hands of the operators, which in the operation of the economic system, results to the common detriment. Article 39 (c), therefore, is inapplicable to the facts of the present

case. (5) The obtaining of the President's instructions under the proviso to Article 213 (1) is vitiated by a non-disclosure of material facts. (6) The President's assent under Article 31 (3) and Article 254 (2) is void for misrepresentation as also in his failure to consider all the relevant factors in granting the assent. (7) The compulsory acquisition under Article 31 (2) is not permissible in respect of plant, machinery or stock-in-trade for Government trading. (8) The impugned Ordinance does not comply with Article 31 (2), at least in so far as the owners of more than 3/4th of the motor vehicles running in the State of Madras are under hire-purchase agreements and the impugned Ordinance is beyond the legislative competence of the State Government in so far as the rights of the financiers under the hire-purchase agreement and under the Hire Purchase Act (XXVI of 1972) and the agreements themselves are hypothecated by the financier in favour of the scheduled banks to secure finance. (9) The assent under Article 254 (2) can only relate to an attempt to obtain uniformity and is a matter falling under the concurrent list. (10) For the interregnum period, the freezing provisions contained in clauses 14 to 17 of the Ordinance are violative of Articles 14 and 19 of the Constitution. (11) The Emergency Proclamation (Article 358) cannot be invoked and the period of emergency expired long ago. (12) The provisions of the Ordinance relating to compensation are illusory, and therefore void, and have to be struck down.

13. Before we take up the attack on the Ordinance, we shall set out the background and the circumstances under which the Ordinance came to be issued. In *In Re: V. Chakkarai Chettiar*, , Rajamannar, C.J. and Venkatarama Iyer, J., held that the bus operators, who carry on business of plying motor vehicles on public streets carry on business in motor transport which is a right guaranteed under Article 19(1) and that any infringement of that right has to be justified under Article 19 (6). Subsequent to the aforesaid decision the Supreme Court in *Saghir Ahmad Vs. The State of U.P. and Others*, , in considering the validity of a declaration, in terms of Section 3 of that Act to the effect that the stage carriage services among others on the Bulandshahr-Delhi Road, shall be run and operated exclusively by the State Government, held that the U.P. Road Transport Act, 1961, violated the provisions of Article 19(1)(g) and was not protected by Article 19 (6). It may be noted that the Constitution First Amendment Act, 1951, which added a new clause to Article 19 (6) does not apply to the facts of that case.

14. In 1956 the Motor Vehicles Act was amended and a new Chapter IV-A was inserted providing for the State Transport undertaking running the business of Motor Transport, to the exclusion, complete or partial, of all other persons doing business in the State. The validity of the said amendment was upheld in *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, . In June, 1967, the State of Madras laid down the policy of nationalisation of passenger-bus transport under which all routes radiating or terminating in Madras City and all routes in the Kanyakumari District were to be nationalised as and when the permits of the private operators expired. The Government constituted a Committee for implementing the above

decision. A draft scheme was prepared for nationalising the routes in question to the complete elimination of private operators and the scheme was published u/s 68-C of the Motor Vehicles Act. A number of writ petitions were filed in this Court in 1967 challenging the validity of the draft scheme and it was struck down by the High Court. Thereafter, the Governor of Madras inserted Rule 23-A in the Madras Government Business Rules in exercise of his powers under Article 166 of the Constitution. It was provided thereunder that the powers and functions which the State Transport Undertaking could exercise u/s 68-G shall be exercised by the Secretary to the Government of Madras in the Industries, Labour and Housing Department on behalf of the State Government. It was also provided by that rule that the powers and functions of the State Government u/s 68-D of the Act and the rules relating thereto were to be exercised by the Secretary to the Government of Madras in the Home Department on behalf of the State Government. In April, 1968, an Ordinance was promulgated by the Governor which was later replaced by the Madras Act (XVIII of 1968) which became effective from 1st April, 1968. By that Act Section 47 (1) CC, Section 58(2)(A) and Section 68-CG. were added to that Act. Under the first two sections, the Regional Transport Authority was to have due regard to the publication of the draft scheme in granting a permit or a renewal of a permit. The State Transport Undertaking, however, was entitled as of right to the issuance of a temporary permit on the publication of a draft scheme u/s 68 (CC). In exercise of the powers and functions under the new Business Rule 23-A, schemes of nationalisation were promulgated and published. A number of operators again filed a batch of writ petitions challenging the draft scheme as also the validity of the Tamil Nadu Act (XVIII of 1968). The High Court upheld the validity of those provisions including the newly added sections in *A. Sanjeevi Naidu and Others Vs. The Madras State Transport*, and that decision was affirmed by the Supreme Court in *A. Sanjeevi Naidu, etc. Vs. State of Madras and Another*. The Supreme Court, however left open the question of the validity of Madras Act (XVIII of 1968). A third attempt was made by filing a batch of Writ Petitions viz. No. 779 of 1971, etc., batch in the High Court impugning the validity of Chapter IV-A of the Act as amended by Madras Act (XVIII of -1968). By judgment dated 3rd February, 1972, we upheld the validity of Chapter IV-A of the Motor Vehicles Act, as amended. That judgment was affirmed by the Supreme Court in *S.C.A. Nos. 678 to 702 of 1972, etc., batch* by judgment dated 9th January, 1973. Meanwhile, on 18th June 1971 the State Government brought in the Tamil Nadu Ordinance 6 of 1971 seeking to amend the Motor Vehicles Act by imposing a ceiling of 10 bus permits on the holding of permits and that Ordinance was replaced by Madras (Act XVI of 1971) which became law on 30th July, 1971. In regard to the bigger operators, that is persons holding 50 or more permits, the Government considered that the stage carriages of such fleet operators should be acquired, and it is with that object Madras Act (XXXVII of 1971) came to be passed and it became law on 7th December, 1971. The validity of Act (XXXVII of 1961) was upheld by us in *W.P. No. 395 of 1972, etc., batch*, by judgment, dated 19th July, 1972.

15. The result of the above enactments and the decisions of Courts show that the Government with a view to nationalise bus transport have successfully replaced private bus operators operating on the various routes. The Government so far was satisfied with excluding private operators. Now, the present attempt is to prevent the bus operators from dealing with their vehicles and for acquiring the same by themselves to the exclusion of others on terms dictated by them. In order to effectuate their intentions the impugned Ordinance has been brought in.

16. We shall now analyse the various provisions of the impugned Ordinance. The object of the Ordinance is to provide for the acquisition of the stage carriages and contract carriages, and for certain other matters connected therewith in the State of Tamil Nadu. The Preamble portion of the Ordinance states : (1) It has become expedient to nationalise the transport of passengers by road in this State ; (2) It is necessary in the public interests to acquire all passenger transport divisions of all the stage carriage operators and the contract carriage operators in a phased programme within a period of five years; (3) To achieve the above purpose, it is considered expedient to start with the acquisition of the passenger transport divisions in the revenue districts of the State wherein comparatively fewer number of stage carriages are operating; (4) The Legislature of the State not being in session, the Governor of Tamil Nadu is satisfied that circumstances exist which render it necessary for him to take immediate action; and (5) The instructions of the President have been obtained in pursuance of the proviso to Clause (1) of Article 213 of the Constitution to promulgate an Ordinance. The explanatory statement accompanying the Ordinance refers to the directive principles of State policy embodied in Clauses (b) and (c) of Article 39 and the necessity to nationalise the passenger transport system in the State in stages. The said statement also refers to the Government being convinced with the development of a vital sector, like passenger transportation, on sound lines having regard to public interest which cannot be left to the leadership of private sector working merely for profits and expending only in sectors where profits are available and that all the villages in the State should be connected by a passenger transport system to enable the rural people to move about freely without undergoing undue hardship and that the net work of transportation facilities will facilitate the Government's activities in social welfare in fields, such as family planning, health, education, and that passenger transport services should be run regardless of the return, under public ownership. The note further expatiates on the wasteful competition in running passenger transport services, and the competition resulting in overall wastage of resources from the point of view of national economy and in order to run on efficient and economic service for the benefit of the community as a whole, it will have to be nationalised. The Ordinance which was promulgated by the Governor on 12th January, 1973, was published on 14th January, 1973. Clause 1 (4) (a) of the Ordinance provides that clauses 14, 15, 16 and 17 shall come into force at once. Clause 5 (4) (b) provides that the rest of the provisions of the Ordinance in relation to the stage carriages shall come into force on such date as the

Government may, by notification, appoint, and that different dates may be appointed for different districts in this State for its application. Clause 2 declares the State policy and states that the Ordinance, is for giving effect to the policy of the State towards securing the principles in Clause (b) of Article 39 of the Constitution and the acquisition of the stage carriages and contract carriages. The acquisition of stage carriages shall commence with the district wherein comparatively fewer number of stage carriages are operating and shall thereafter be extended to the other districts in that order as specified in the Second Schedule, within a period of five years. Clause 3 is the definition clause . Clause 3 (a) defines "acquired property" as meaning the stage carriages and other property vesting in the Government u/s 4. Clause (4) defines "operator" as meaning any person whose name is entered in the stage carriage permit, or contract carriage permit as the holder thereof. Clause (0) defines "person interested" in relation to any acquired property, as including the stage carriage operator, and any other person who is affected by the vesting of the acquired property, claiming, or entitled to claim, an interest in the amount. The words "stage carriage" have been given an extended meaning as including : (") any movable property ancillary or incidental to the maintenance and control of such stage carriage ; (ii) any right in or over such stage carriage or movable property ; and (iii), any reserve vehicle for vehicles on temporary permits. Clause (4) is the vesting provision and Sub-clauses (1), (2) and (3) thereunder are set out below:

4. (1) On and from such date as may be notified by the Government in this behalf in respect of any stage carriage operator or contract carriage operator, every stage carriage or contract carriage owned or operated by such stage carriage operator or contract carriage operator along with the permit, shall vest in the Government absolutely, free from all encumbrances, and such stage carriage or contract carriage which vests in the Government shall, by force of such vesting, be freed and discharged from any trust, obligation, mortgage, charge, hire-purchase agreement or otherwise and all other encumbrances or transactions affecting such stage carriage or contract carriage in any manner shall be deemed to have been withdrawn and any person interested shall have no claim in such stage carriage or contract carriage, except a claim to the amount payable in respect of such stage carriage under this Ordinance.

(2) Upon the issue of a notification under Sub-section (1) in respect of any-such operator-

(i) all right, title and interest of the stage carriage operator or the contract carriage operator, as the case may be, in or over such land?, buildings, workshops and other places and all stores, instruments, machinery, tools, plants, apparatus and other equipments predominantly used for the maintenance or repair of, or otherwise in connection with the service of, stage carriages or contract carriages, as the Government may, specify, by order in this behalf; and

(ii) all books of accounts, registers, records, and all other documents of whatever

nature relating to the stage carriages or contract carriages vested in the Government under Sub-section (i) or to the property specified by the Government under Clause (i), shall vest in the Government absolutely and free from all encumbrances, and such property referred to in this sub-section which vests in the Government shall, by force of such vesting, be freed and discharged from any trust, obligation, mortgage, charge, lien, hire-purchase agreement or otherwise and all other encumbrances or transactions affecting such property; and any attachment, injunction or decree or order of any Court restricting the use of such property in any manner shall be deemed to have been withdrawn ; and any person interested shall have no claim in such property, except a claim to the amount in respect of such property under this Ordinance.

(3) The stage carriages or contract carriages and other property vesting in the Government under Sub-section (1) and Sub-section (2) shall, with effect on and from the notified date, be deemed to have been acquired for a public purpose.

Clause 5 imposes an obligation upon all stage carriage operators to furnish particulars within 30 days from the notified date or within such time as the Government may allow, -(i) furnish to the Government or any officer authorised by them complete particulars of all liabilities and obligations incurred on the security of the acquired property and subsisting on the notified date and also of all agreements and other instruments pertaining to the acquired property including agreements, decrees, awards, standing orders, and other instruments relating to leave, pension, gratuity, Provident Fund and other terms of service of any person referred to, in Sub-section (3) of Section 20 in force immediately before the notified date, (ii) prepare and hand over to the Government or any office authorised by them in this behalf a complete inventory of the property which vests in the Government under this Ordinance, and (iii) furnish such information and particulars as may be required by the Government in regard to the documents relating to the property which is acquired. Clause 6 relates to the principles and method of determining the amount for the acquired property. Sub-clause (i) provides that every person interested shall be entitled to receive such amount as may be determined in the manner set out in the First Schedule. Sub-clause (ii) deals with the amount for the acquired property : (i) being fixed by the agreement between the parties; (ii) where no such agreement can be reached, the Government appointing an arbitrator who shall hear the dispute and make an award determining the amount which appears to him just and reasonable and also specifying the person or persons to whom the amount shall be paid. The arbitrator is also empowered to decide the dispute inter se as to the persons entitled to receive the amount. It is further stated that the provisions of the Arbitration Act shall not apply to such arbitrators. Clause 7 provides for issue of notice to all persons interested, in determining the amount due under clause 6. Clause 8 provides for preferring claims against the compensation amount and the procedure thereof. Clause 9 states that any debt, mortgage, charge or other encumbrance or lien, etc., shall attach to the amount in substitution for the acquired property. Clause 10 refers to deduction out of the compensation

amount. Clause 11 deals with the manner of payment of amount for the acquired property. Clause 12 provides for appeals from Such awards to the High Court. Clause 13 deals with the procedure before the arbitrator. Clauses 14 to 19 are the interim provisions. Clause 14 places an embargo upon the applications for fresh permit or renewal of existing permit, for running any stage carriage. The latter limb of the clause provides that the authority shall grant such permit to the corporation or company owned by the Government ; or the State Transport Department of the Government, as the case may be, and to no other; clause 15 prevents the transfer of stage carriages by way of sale or gift, etc., except in favour of the Government or corporation or company owned by the Government or the State Transport Department of the Government. Where any transfer is made, by way of sale, in favour of the Government or corporation or company owned by the Government or the State Transport Department of the Government, the price to be paid shall be calculated in accordance with the principles for determining the amount under this Ordinance for such property. Clause 16 relates to the grant of temporary permits to operators running any stage carriage in the State for a period of 4 months in the first instance which may be extended for further periods of four months at a time until the stage carriage transferred to the corporation or company of the State Transport Department. Clause 17 states that the transfer in contravention of clause 15 shall be void. Clauses 18 and 19 deal with appointments of administrators and authorised officers. Clause 20 deals with the existing staff employed by the operators as on the date of the notification. Clause 26 is an exemption provision. Clause 27 deals with the protection of action taken in good faith and clause 28 bars jurisdiction of the civil Courts in respect of matters which are covered by the Ordinance, and further provides that no injunction shall be granted by any Court in pursuance of any action taken in pursuance of the Ordinance, Clause 31 is a material provision which runs as follows : -

31. Save as otherwise provided in this Ordinance, the provisions of this Ordinance shall have effect notwithstanding anything inconsistent therewith contained in the Motor Vehicles Act or in any other law for the time being in force.

Clause 32 is the rule-making power. There are two Schedules to the enactment. The First Schedule u/s 5 of the Act states the principles of determination of amount in respect of stage carriages taken over by the Government, Clause 1 thereunder provides for the determination of the acquisition cost of such stage carriages. The Explanation to clause 1 explains that the "acquisition cost" shall be the aggregate cost of the chassis as well as the body of the stage carriage or contract carriage as charged by the manufacturer and by the body-builder.

17. Clauses 3 and 4 of the First Schedule deal with the fixation of the market value of the land taken over and the market value of the buildings as estimated by the Public Works Department of the Government. It may, however, be noted that the date on which the market value has to be determined is not stated therein. The Second Schedule gives the total number of buses operating in Tamil

Nadu, districtwise. In exercise of the powers conferred by clause 32 of the Ordinance, the rules called "The Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Rules, 1973 have also been made which came into force on 14th January, 1973.

18. From the above resume of the provisions of the Ordinance, it is seen that the real owner of the stage carriages, viz., the financiers under the hire-purchase agreements, have been totally ignored. Nearly 90 per cent, of the vehicles purchased by the operators are financed either by small financiers, or big financiers, like Sundaram Finance or Khivraj Chordia and others. There are 500 to 600 hire-purchase financiers in Tamil Nadu and the amount outstanding to the various financiers in the State will be in the region of 25 to 30 crores of rupees. The bus operator when he acquires a permit seeks the assistance of one or the other of the financiers and enters into a common form of agreement a copy of which has been annexed to the affidavit in W.P. No. 876 of 1973. We shall refer to the relevant clauses in the agreement in order to appreciate the contention that the agreement proceeds on the footing that the financier is the owner of the stage carriage. The descriptive part of the agreement runs as follows : -

An agreement made this... day of.. 19 . between... carrying on business at ... Madras (hereinafter called "an owner") of the one part and Mr... (hereinafter called "the hirer") of the other part.,

Whereby it is agreed as follows : -

1. The owner will let and the hirer will take on hire upon the terms and conditions hereinafter expressed, the motor vehicle, equipments and accessories described in the A Schedule here to (hereinafter called "the Vehicle" for the term of... months and.... days from the....day of. ...at the rent specified in the B Schedule hereto and payable without demand on the date therein mentioned.

2. It is agreed between the parties that on account of the expected depreciation in the price of the vehicle the hire of the first month is fixed at Rs. ... The hire for future months shall be as mentioned in the B Schedule.

Clause 2 deals with the obligations of the hirer; Sub-clause (g) therein provides "not sell, charge, pledge, assign or part with possession of the vehicle". Clause 12 states that the hirer shall not use or permit or suffer the vehicle to be used for any purpose other than that described in the relative proposal for hire purchase, except with the consent in writing of the owner.

In clause 13 it is stated that the vehicle being the property of the owner shall not be subject to any lien, charge or claim in respect of any rent due by the hirer to the landlord in respect of the premises where the hirer is residing or where he is carrying on. business in respect of the premises where the vehicle is garaged or placed at any time, etc.

A Schedule gives the description of the vehicle and B Schedule provides for the instalments payable and the dates on which the payments have to be made. This

agreement is signed both by the owner and the hirer. The agreement is followed up by a guarantee letter whereunder the hirer guarantees the repayment of the future instalments and agrees to abide by the terms and conditions of the agreement on obtaining a full and complete discharge of all obligations from the owner. The hirer's proposal form gives particulars regarding the prices of the vehicle and other details relating thereto.

19. Hire-purchase, as the name indicates, is a system of purchasing goods through a hiring contract. The position, of the two elements of the compound word shows that "purchase" is the substantive word and of primary significance, while "hire" is an adjective, an attributive adjunct. It is only a qualification of the primary idea as in "cash purchase" or "credit purchase". So the thing is "purchase" with the attributes of "hire" and not "hire" with the attributes of a purchase.

Helby v. Mathews and Ors. 1895 A.C. 471, is the leading decision in England on the law of Hire-Purchase. The facts therein are as follows : -The appellant was the owner of a plant of which he had given possession to one Brewster, under an agreement in writing dated 23rd December, 1898. On 23rd April 1899 Brewster, improperly and without the consent of the appellant, pledged the piano with the respondents, who were pawnbrokers, as security for an advance. On discovering this the appellant (owner) demanded the piano from the respondents and on their refusing to deliver it, brought an action of trover. The defence was that they had received the piano from Brewster in good faith, and without notice of any Claim on the part of the appellant and that they were protected by Section 9 of the Factors Act, 1889. The County Court Judge held that the defence was not established and that decision was upheld by the Divisional Court (Lord Coleridge, C.J. and Day, J.). The Court of Appeal (Lord Esher, M.R., A.L. Smith and Davey, L. JJ.) came to the conclusion that the defence had been established and reversed the decision of the Divisional Court and the matter was taken up to the House of Lords. The House of Lords set aside the judgment of the Court of Appeal. Lord Herschell, L.C. in the course of his speech observed as follows : -

A person who is in possession of a piano under such an agreement as that which existed in the present case is no more its apparent owner than if he had merely hired it, and in the latter case any one taking it as security would have no claim to hold it as against the owner.

Lord Mcnaughten observed as follows:

The musical instrument dealer let out a piano by the month, and undertook to sell it to the customer conditionally on his making a certain number of monthly payments. But it was the intention of the parties- an intention expressed on the face of the contract itself that no one of these monthly payments until the very last in the series was reached, nor all of them put together without the last, should confer upon the customer any proprietary right in the piano or any interest in the nature of a lien or any interest of any sort or kind beyond the right

to keep the instrument and use it for a month to come. The customer was under an obligation to fulfil the conditions on which and on which alone the dealer undertook to sell. He was not bound to keep the piano for a single day or a single hour. He was no more bound to purchase it after he had signed the agreement than he was before. The contract, as it seems to me, on the part of the dealer was a contract of hiring coupled with a conditional contract or undertaking to sell. On the part of the customer it was a contract of hiring only until the time came for making the last payment. It may be that at the inception of the transaction both parties expected that the agreement would run its full course, and that the piano would change hands in the end. But an expectation, however confident and however well founded, does not amount to an agreement, and even an agreement between two parties operative only during the pleasure of one is no agreement on his part at law.

This principle which was enunciated by the House of Lords for the first time has been followed in India. In England the law relating to hire purchase was codified, and in India the Hire Purchase Act (XXVI of 1972) has codified the law. It is unnecessary to refer to the various provisions of the Act. It is enough to refer to the definition of "hire-purchase agreement" in Section 2 (c) as meaning an agreement, under which goods are let on hire and under which the hirer has an option to purchase them in accordance with the terms of the agreement and includes an agreement under which : -

- (i) possession of goods is delivered by the owner thereof to a person on condition that such person pays the agreed amount in periodical instalments, and
- (ii) the property in the goods is to pass to such person on the payment of the last of such instalments, and
- (iii) such person has a right to terminate the agreement at any time before the property so passes.

The owner is defined in Section 2 (f) as meaning the person who lets or has let, delivers or has delivered possession of goods, to a hirer under a hire-purchase agreement of goods, to a hirer under a purchase agreement and includes a person to whom the owner's property in the goods or any of the owner's rights or liabilities under the agreement has passed by assignment or by operation of law. It is unnecessary to refer in detail to the other provisions of the enactment. It is, therefore, clear that both before and after the Hire Purchase Act the financier is the owner of the stage carriages and continues to be its owner until the last instalment is paid and an acquittance is obtained from the owner.

20. Sri V.K.T. Chari, who appeared for the petitioners, contended that the hire-purchase agreement being the usual type of a commercial transaction it is surprising that the rights of the financier under such agreement have been totally ignored in the impugned Ordinance. At this stage we shall refer to the portion of the counter-affidavit of the Government in W.P. No. 876 of 1973 wherein it is stated in paragraph 3 as follows : -

As for the contention based on the status of the petitioner vis-a-vis the vehicle it is submitted that the petitioner cannot claim to be the owner of the vehicle in the real or proper sense. The apprehension of the petitioner that since there is no direct mention about the hire-purchase financiers, the provisions of Sections 6 to 8 of the Ordinance do not serve the needs of a bank or hire - purchase financier is wholly unjustified. Section 3 (1) defines that a person interested in relation to an acquired property includes the operator of the stage or contract carriage and any other person who is affected by the vesting of the acquired property claiming or entitled to Claim an interest in the amount and it is very wide to include even cases referred to by the petitioner. The bald allegation that the various provisions of the Ordinance are hopelessly vague is stoutly denied.

21. In paragraph 8 of the counter-affidavit of the Government in W.P. No. 123 of 1973 in dealing with the position of secured creditor and treating the financiers as secured creditors it is stated as follows : -

It is further submitted that the judgment of this Court in Manasuba's case (1969) 1 C. L.J. 5, are peculiar to the facts and circumstances of that particular case and the said judgment cannot in any way stand in the way of the State acquiring the property in question. As for the contention of the petitioner based on the provisions of the Ordinance providing for vesting of property free from all or any encumbrance, it is submitted that such provisions are essential for assuring effective vesting and is incidental to the power of acquisition. Further, it is Submitted that it is usual to introduce such a provision in all the laws relating to acquisition or providing for vesting to make it complete and that the said provision is just and reasonable. The several propositions of the petitioner made with reference to the status and rights of the hire-purchase company are too wide and general in their terms and suffice it to state that this right does not suffice (? sic), or subscribe to the same. The allegation that the Ordinance provides for taking away the vehicle or the amount due from the stage carriage operator is wholly incorrect.

We find no justification for the stand taken by the respondents regarding the status of the petitioner. In the affidavit filed in support of the Writ Petition a specific reference was made to the judgment of this Court in Manasuba and Go. (Private) Ltd. by Official Liquidator v. Commissioner of Police, Madras and Ors. (1969) 1 C. L.J. 5, The facts therein are follows : -

The Official Liquidator, Manasuba and Co., (Private) Ltd., filed an application for determination of the rights of the respondents who claimed preferential rights over the sale proceeds of the various vehicles belonging to the Company in liquidation and sold by him with the consent of such respondents and by orders of Court. Apart from one vehicle, all other vehicles were subject to either hypothecation agreement or hire-purchase agreement in favour of more than one respondent to the petitioner. The vehicles were purchased by the managing director by hypothecation of such vehicles on a hire purchase agreement which in commercial parlance is known as a re-financing agreement. Ramaprasada Rao.,

J., at page 21 observed as follows : -

With the growth of society and its needs the old conventional and orthodox system of credit, has changed and novel and new innovations have been made in the matter of such borrowing and lending. A citizen is now enabled to secure articles of utility by paying the price therefore in instalments. This was rare in olden days. With the advancement of commerce and industry, a new outlets and a marketing system commonly known as "hire-purchase system" has been introduced. Under this system the mutual rights and obligations of a lender and a borrower or to adopt the words used in hire-purchase agreement, the "owner" and the "hirer" are curiously veiled in mercantile allegorical language. Such inherence of allegory and peculiar Words in the documentation of the system, has compulsorily led Courts of law to pierce through such a commercial veil and find out the real scope and intendment of the bargain.

Where a customer acquires a new vehicle from a dealer but is unable to pay the price therefore to the dealer, he straightaway approaches the financier, who purchases the vehicle from the dealer, through the instrumentality of the customer and in return enters into a hire-purchase agreement with the customer, providing therein a right to the customer to become the owner after payment of all dues to the financier on paying a nominal price as agreed to. Under a refinancing hire-purchase agreement the financier is described as the owner and the customer as the hirer and when the financier seizes the vehicle for non-payment of instalments by the customer, the financier becomes a pledger. At page 25, the learned Judge made the following observations:

From the above discussion, the following points emerge; (a) In the case of a financing hire purchase agreement, the financier being the owner, is entitled to be treated as a preferential creditor by the Official Liquidator and no question of conflict of his interests with the other creditors, even though secured, will arise; (b) In the case of refinancing hire-purchase agreement, the financier is, no doubt, a secured creditor. But, his rights are subject to Sections 125 and 132 of the Companies Act, 1956, and if he is able to surpass and hurdle the same, he would be entitled to be treated as a preferential creditor by the Official Liquidator ; (c) A hypothecatee is a . secured creditor and has to be treated as such, subject, however to the provisions of Sections 125 and 132 of the Companies Act, 1956; (d) All creditors having an enforceable charge-legal or equitable, over the moveables of the company, have a right to trace such lien even over the sale proceeds of the hypotheca, if indeed the movable property has been so converted.

Relying on the aforesaid decision Mr. V.K.T. Chari contends that under the financing hire-purchase agreements, the financier is the owner and entitled to the entirety of the amount representing the vehicle and that he is not a creditor or secured creditor who in accordance with the provisions of the Ordinance is entitled to payment after the preferential creditor's claims are met.

22. The learned Advocate-General, who appeared for the State contended that the financier under the hire-purchase agreement will be covered by the definition of a "person interested", failing under clause 2 (0) of the Ordinance and that his rights to a share in the compensation is provided under clause 8 of the Ordinance, that the amount determined under clause 6 shall, after deductions, if any, under this Ordinance, be given by the Government to the person interested and consequently, the financier can still work out his lights under the Ordinance. Mr. V.K.T. Chari, however, maintains that after deduction out of the compensation amounts the various amounts as per Clause (10), very little will be left and consequently the rights of the owner, who is entitled to the entirety of the amount, will be seriously affected. It is seen that these financiers deposit the financing hire-purchase agreement with banks and raise monies and when once their security is affected the bank's security will also be affected resulting in huge losses both to the financier and to the banks.

23. The impugned Ordinance purports to adopt the scheme followed in the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, and similar enactments fixing an appointed day for vesting of the properties free of all encumbrances and setting out the principles of compensation payable in respect of the properties acquired, etc. But, the draftsmen of the present Ordinance have failed to note one essential difference between the impugned Ordinance and the said enactment, that is, the existence of hire-purchase agreements under which the rights of financiers as owners are involved. There has not been any estate which has been purchased under the hire-purchase agreement in any of the zamindaries abolished, and this peculiar feature has not been taken note of in the impugned Ordinance and provided.

24. We shall next take up the attack of Mr. Chari, on clause 4 of the Ordinance wherein the acquisition and the vesting in the Government on the notified date is deemed to have been done for a public purpose. The learned Counsel developed his arguments by stating that the expression "deemed to have been acquired for public purpose" itself shows that the acquisition is not for a* public purpose. In support of his contention the learned Counsel referred to the decision of the Privy Council in the Commissioner of Income Tax, Bombay Presidency v. Bombay trust Corporation Ltd. ILR 54 Bom 216 . At page 223 Lord Dunedin observed as follows : -

Now when a person is "deemed to be" something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were.

In the Queen v. The County Council of Norfolk 60 L.J.R. Q.B.D. 379 Gave, J., at page 380 observed as follows:

When you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is deemed to be, and that, notwithstanding it is not that particular

thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing.

In Dowager Rani Lalitha Kumari Devi and Others Vs. The Raja of Vizianagaram and Others, , Venkatarama Ayyar, J., dealt with this aspect of the matter in considering the effect of inclusion or exclusion of estates on the basis of judicial determination in the Schedule to the Madras Impartible Estates Acts, 1902, 1903, and 1904 wherein Section 3 stated that the estates included in the Schedule shall be deemed to be impartible estates. The learned Judge observed that it is recognised by Section 3 that the estate might not in fact be impartible on the date of legislation, but as a matter of policy, it is treated as if it were impartible. That, clearly is the significance of the word "deemed".

25. The contention, therefore, is that the acquisition is not for a public purpose, but is "deemed" to be for public purpose, for the purpose of the Ordinance.

26. Mr. Chari next attacked clause 6 of the First Schedule enunciating the principles of determination of the amount for the acquired property. Apart from the attack that the real owner is out of the picture, the learned Counsel contended that the principles enunciated in the First Schedule are not easily workable. The acquisition cost that is referred to in clause 1 of the First Schedule, which is stated to be the aggregate cost of the chassis as well as the body of the stage-carriage as charged by the manufacturer and by the body-builder cannot easily be known, and in respect of one vehicle which is under the hire-purchase agreement, the full details as to how the details are worked out in terms of the First Schedule are pointed out ; this was filed as an Annexure to the affidavit in W.P. No. 1486 of 1973. We Will set out the same below in appreciating the contention of the learned Counsel.

Annexure to Affidavit in W.P. No. 1486 of 1973. 1. Hirer's Name (Con. .. Mr. P. Chin- No.) nusamy, Rasi- puram LC-99 dt. 16-8-72. 2. Make of the vehicle .. Leyland bus. 3. Model of the vehicle.. 1972. 4. Registration number of the vehicle .. TNS-3637. 5. Date of registration.. 18-11-1972. 6. Price charged by manu- facturer .. Rs. 60,548. 7. Excise duty .. Rs. 5,340. 8. Sales Tax .. Rs. 10,542 9. Other charges .. Rs. 1,096 10. Total cost of Chassis as per dealer's Invoice (6 to 9) .. Rs. 77,526. 11. Initial payment (paid by the hirer) towards chassis .. Rs. 7,526. " body. .. Rs. 5,000. 12. Body inclusive of sales- tax paid by the hirer approximate. .. Rs. 27,000. 13. Total (10+12) .. Rs. 1,04,526 14. Amount financed .. Rs. 70,000. 15. Finance charges .. Rs. 16,100. 16. Total .. Rs. 86,100 + .. Rs. 3,200 (Insurance) 17. Repayment period .. 30 months. 18. Instalments so far paid by the hirer. .. Rs. 9,880 19. Outstanding as on 1-1-73 .. Rs. 79,420. 20. Amount as per Ordi- nance .. Rs. 74,415 21. Payments so far made by the operator : .. Rs. 7,526. Intial payment body... Rs. 27,000. Instalments so far paid. Rs. 9,880.

From the above statement, Sri V.K.T. Chari demonstrated that the amount payable for the acquisition is far less than the amount payable to the financier. It

is unnecessary to probe into this matter in the view that we are taking on the provisions of the Act.

26.a The next ground of attack of Mr. Chari is that the provisions applicable in the interregnum period, viz., from the date of the Ordinance to the final date of taking over of all the buses in the State, viz., five years period, abridge the right of the permit-holder as also the financiers who under the hire-purchase agreement carry on business of plying buses. Clause 1 bars applications for fresh permit and for renewal of existing permit for running any stage carriage, and it further provides that the authority or officer empowered to grant permits under the Motor Vehicles Act, shall, notwithstanding anything contained therein, grant such permit to the Corporation or Company owned by the Government; or the State Transport Department of the Government, as the case may be, and to no other. Clause 15 prohibits transfer by way of sale or gift any stage carriage liable to be acquired under this Ordinance except in favour of the Government or Corporation or Company, owned by the Government, or the State Transport Department of the Government and states that where any transfer is made by way of sale to the Government or other bodies referred to therein, the price to be paid shall be calculated in accordance with the principles for determining the amount under this Ordinance for such property. Clause 16 entitles the operator to a temporary permit for a period of four months in the first instance which may be extended for further periods of four months at a time until the stage carriage is transferred to the Corporation or Company or the State Transport Department. The position, therefore, is that from the date of the coming into force, of the Ordinance till the date of the notification District-wise, the buses are allowed to ply under the temporary permits and) the financiers will be entitled to collect their monthly instalments from the operators in accordance with the hire-purchase agreement. In case of default necessitating the seizure of the bus, the financiers cannot realise their dues by dealing with the seized vehicle, but are obliged to sell the same to the Corporation or Company or the State Transport Department at a price to be worked out in accordance with the First Schedule in the Ordinance. The result will be that the financiers may not in all cases recover the entire amount due to them and their rights will be seriously affected. These provisions when considered in relation to the permit-holder not covered by the hire purchase agreement who will have no option to deal with the bus, and who will have no interest in the bus will be reluctant to invest any monies to make the vehicle road-worthy, his only attempt would be to realise to the maximum extent possible during this interval regardless of the convenience of passengers. Such permit-holder knows full well that there is no question of renewal of the permits for any length of time except to the period in accordance with the Governments programme of phased taking over of the buses, and the buses acquired by the Government would be mere junks which when put on the road will result in serious inconvenience to passengers.

27. Mr. Chari next referred to Clause 28 which bars the jurisdiction of civil Courts in respect of any matter which the Government or an Arbitrator or authorised

officer who is empowered under this Act to determine, and contended that these are unreasonable restrictions in getting redress for claiming compensation for deprivation of his property and his being thrown out of business.

28. Mr. Chari next referred to Clause 31 which purports to be an overriding provision and the criticism of the learned Counsel is that a State enactment under this Clause cannot seek to override a Central enactment, namely, the Motor Vehicles Act, the Hire Purchase Act, etc.

29. We are of opinion that there is considerable force in Mr. Chari's attack on the enactment on the ground that the financiers, who are the real owners, have been totally ignored and that the enactment proceeds on a misapprehension of the real position of the financier under the hire purchase agreement, that the financier being the owner of the vehicle cannot fall under the description of "a person interested" entitled to claim the compensation as representing the acquired vehicle. As regards the interim provisions, viz., Clause 14 to 17 we find considerable force in the contention of Mr. Chari, both from the point of view of the financiers as also of the operators.

30. Apart from the attack on the provisions of the Ordinance dealt with by us above, Mr. Chari next contended that the provisions of the Ordinance do not fall either under Article 39 (b) or (c) of the Constitution. Article 39 (b) and (c) of the Constitution of India runs as follows : -

The State shall, in particular, direct its policy towards securing : -

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

31. We shall first take up the question whether the taking over of motor vehicles under the impugned ordinance falls under Article 39 (b). Article 39 falls under Part IV of the Constitution relating to Directive Principles of State Policy. We shall refer to the various decisions by the Supreme Court as to how the provisions of Part IV of the Constitution have to be read. We shall here give a list of the principal decisions dealing with this aspect, as we propose to deal with these decisions in full in due course. The State of Madras Vs. Srimathi Champakam Dorairajan, ;"> I.C. Golak Nath and Others Vs. State of Punjab and Another, . The result of the aforesaid decisions is that Article 39 (b) and (c) falling under Chapter IV had to be integrated with the provisions contained in Chapter III and have to be read together.

32. Even so, Mr. Chari contends that the content of Article 39 (b) does not take in acquisition of moveable property like a bus. In order to prevent the concentration of the material resources of the community, its distribution amongst the members of the community is contemplated to subserve the common good. Immovable property is limited and with the growth of population

the needs of the community become more acute, and if such properties in which the community has an interest are concentrated in the hands of a few, Clause (b) provides that the ownership and control of such "material resources" should be so distributed as to prevent concentration, in a few. Clauses (b) and (c) of Article 39 of the Constitution are substantially copied from clauses 3 and 4 of Article 45 of the Constitution of Eire, 1937. The said provision in the Irish Constitution runs as follows : -

45 (2)-the State shall, in particular, direct its policy towards securing-

(i) that the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provisions for their domestic needs;

(ii) that the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes, as best to subserve the common good.

What then, in the context, is the meaning of the words "material resources". In order to understand the meaning of these words, it is necessary to refer to the Constituent Assembly Debates when the above provision was under discussion. The present Article 39 corresponded to Article 31 of the draft Constitution. Prof. K.T. Shah moved for substitution of the following Clause (ii) of Article 31 for the existing clause. The amendment sought to be moved ran as follows : -

(iii) that the ownership, control and management of the natural resources of the country in the shape of mines and mineral wealth, forests, rivers and flowing waters, as well as in the shape of the seas along the coast of the country shall be vested and belong to the country collectively and shall be exploited and developed on behalf of the community by the State as represented by the Central or Provincial Governments or local governing authority or statutory corporation as may be provided for in each case by Act of Parliament.

Prof.K.T. Shah in moving the amendment spoke as follows : -

I think there can be no dispute on this proposition that as regards the natural resources that I have tried to describe, no human being has lent any value to those resources by his or her own labour.

They are gifts of nature. They are the initial endowment which each country has, in greater or less measure; and, in mere equity, they should belong to all people collectively. And, if they are to be developed, they should be developed also by, for, and on behalf of the community collectively.

In the resources that are mentioned in my amendment not only is there no creation of any value or utility by anybody's proprietary right being there, but what is more, the real value comes always by the common effort of society, by the social circumstances that go to make any particular interests of resources of this kind valuable.

"Take mines and mineral wealth. Mines and mineral wealth, as everybody knows, are an exhaustible,-a wasting asset. Unfortunately, these, instead of having been guarded and properly protected and kept for the community to be utilised in a very economical and thrifty manner, have been made over to individual profit-seeking concession-holders and private monopolists, so that we have no control over their exploitation, really speaking, for they are used in manner almost criminal so that they can obtain the utmost profits on them for themselves, regardless of what would happen if and when the mine should come to an end or the stored up wealth of ages past is exhausted.

I suggest, therefore, that we allow no long range interests of private profit-seekers involved in the utilisation of these mines and the mineral wealth, that on the proper utilisation of these mines and mineral wealth depends not only our industrial position, depends not only all our ambitions, hopes and dreams of industrialising this country, but what is much more, depends also the defence and security of the nation. It would, therefore, I repeat be a crime against the community and its unborn generations, if you do not realise, even at this hour, that the mineral wealth of the country cannot be left untouched, in private hands, to be used, manipulated, exploited, exhausted as they like for their own profit.

It is high time, therefore, that in this Constitution, we lay down very categorically that the ultimate ownership, the direct management, conduct and development of these resources can only be in the hands of the State or the agents of the State, the representatives of the State, or the creatures of the State, like provinces, municipalities, or statutory corporations.

"Most of these forms of wealth, I need hardly tell this House, are yet undeveloped, or developed in a very, very superficial manner. It is to be hoped that in years to come, we shall undertake and carry out a much more direct, a much more effective and efficient plan for the all-round development of the country, in every part and in every item of our available resources. If that is so, if we are going to achieve, if we are going to take that as our first concern, for the new life that is pulsating throughout the country, then I put it to you, Sir, that without some such proviso, it would not be possible to attain the objective as quickly and as economically as we would desire.

"I would only add one word. Deliberately, I have not included in the list of initial resources of the country, the biggest of them, namely land. I have not mentioned it, not because I do not believe that land should be owned, operated and held collectively, but because I recognise that the various measures that have in recent years been adopted to exclude landed proprietors- zamindars-to oust them and take over the land, would automatically involve the proposition that the agricultural or cultivable land of this country belongs to the country collectively, and must be used and developed for its benefit.

"For these reasons, therefore, Sir, while particularising the natural resources which we should have in common ownership and develop collectively I have deliberately left out perhaps the most important of them all. But, that, I trust will not prejudice the fact of this proposition by itself. I commend it to the house,"

(Vide : pages 406 to 508 in the Constituent Assembly Debates, Volume VIP. Other amendments were also moved to the draft Article. Hon''ble Dr. Ambedkar dealt with these various amendments, and in particular with the above amendment, moved by Prof. K.T. Shah. With regard to his (Prof K.T. Shah's) amendments, viz., substitution of his own clauses for Sub-clauses (ii) and (iii) of Article 31, Dr. Ambedkar said as follows:

all I want to say is this, that I would have been quite prepared to consider the amendment of Professor Shah if he had shown that what he intended to do by the substitution of his own clauses was not possible to be done under the language as it stands. So far as I am able to see, I think the language that has been used in the Draft is a much more extensive language which also includes the particular propositions which have been moved by Professor Shah, and I therefore, do not see the necessity for substituting these limited particular clauses for the clauses which have been drafted in general language deliberately for a set purpose. I, therefore, oppose his second and third amendments.

The Vice-President put the amendment to vote, and the motion was negatived. From the above discussion, it is clear that what is meant by "material resources" occurring in Article 39(1) is the same as "natural resources.

33. Sri V.K.T. Chari next referred to Herbert Spencer "On the Principles of Ethics", Part IV, Volume dealing with "Justice". In Chapter XII dealing with the right of property, the learned author states as follows : -

299. Since all material objects capable of being owned, are in one way or other obtained from the Earth, it results" that the right of property is originally dependent on the right to the use of the Earth. While there were yet no artificial products, natural products were, therefore, the only things which could be appropriated, this was an obviously necessary connection. And though, in our developed, form of Society, there are furniture, clothes, works of art, the bank-notes, railway-shares, mortgages, Government bonds, etc., the origins of which have no manifest relation to use of the Earth, yet, it needs but to remember that they either are, or represent, products of labour, that labour is made possible by food, and that food is obtained from the soil, to see that the connection, though remote and entangled, still continues. Whence it follows that a complete ethical justification for the right of property, is involved in the same difficulties as the ethical justification for the rights to the use of the Earth.

34. In Julius Stone on "Social Dimension of Law and Justice", a passage at page 170 was cited by Mr. V.K.T. Chari. It is as follows : -

Sociologically speaking, we may add, formulations of" "natural rights" of man,

whether with the classical, natural lawyers, the French revolutionaries, or the American Constitution-makers and Courts represented a series of de facto claims or demands by individuals pressing for legal security, and approved by those who formulated them. So also, did the "rights" of physical integrity, or free motion and locomotion, or free use of natural resources, or property, exchange, and contract, and of free industry, belief and opinion, which Herbert Spencer drew from a Kantianlike formula of right and justice. In modern times the de facto claims so approved are still often termed rights". But, whereas classical and nineteenth century formulations in terms of "rights" were directed to the expansion of individual autonomy, modern natural rights doctrines tend to be preoccupied with the limitations on such autonomy necessitated by social living.

At page 381, the learned author observed as follows:

The social interests in the conservation of natural resources press "that the goods of existence shall not be wasted ; that where all human claims or wants or desires may not be satisfied, in view of infinite individual desires and limited natural means of satisfying them, the latter to be made to go as far as possible, and, to that end, that acts or courses of conduct which tend needlessly to destroy or impair these goods shall be restrained.

35. In Roscoe Pound on "Jurisprudence", Volume III, the author states as follows at page no : -

In a time when large unoccupied areas were open to settlement and abundant natural resources were waiting to be discovered and developed, a theory of acquisition by discovery and misappropriation of res nullius, reserving a few things as extra commercium did not seem to involve serious difficulty. On the other hand, in a crowded world, the theory of res extra commercium, seems inconsistent with private property.

At page 124 the learned author states as follows : -

Accordingly, he (Lorimer) says, the idea of property is inseparably connected not only with the life of man, but with organic existence in general." Hence "life confers rights to its exercise corresponding in extent to the powers of which it consists.

At page 305 dealing with "Social Interests" and Conservation of "Social Resources" the learned author observes as follows : -

Fourth, there is the social interest in conservation of social resources, that is, the claim or want or demand involved in social life in civilized society that the goods of existence shall not be wasted ; that where all human claims or wants or desires may not get satisfied, in view of infinite individual desires and limited natural means of satisfying them, the latter be made to go as far as possible ; and, to that end, the acts or course of conduct which tend needlessly to destroy or impair these goods shall be restrained. In its simplest form, this is an interest in the use and conservation of natural resources, and is recognised in the

doctrines as to res communes which may be riparian rights and constitutional and statutory provisions where irrigation is practised, by modern game laws, by the recent doctrines as to percolating water and surface water, and by laws as to waste of natural gas and oil.

36. The following passage in Rottschaefer on the "Constitution of the United States" at page 531 illustrates this :

A State has an interest in the preservation and conservation of its natural resources which it may protect by regulating the methods of their exploitation and the manner and extent of their use. It may accordingly, prohibit their use for purposes involving a great amount of waste in order to conserve them for less wasteful uses. It has been held to violate neither the due process nor equal protection clauses to prohibit the use of natural gas for the production of carbon black, unless the potential heat of the gas were fully utilised for domestic or manufacturing purpose. A statute prohibiting the use of fish fit for human consumption for the manufacture of commercial fertilizer does not deprive the owners of reduction plants of their property without due process of law, nor does it deny them the equal protection of the laws to permit fish canners to use their excess fish to produce such fertilizers therefrom, since that was justified as a reasonable difference in treatment between the owners of reduction plants and the owners of fish canneries due to the difference in their respective positions with respect to the State's fish resources. It has also been decided that the preservation of an important industry utilizing a State's natural resources may, where a choice is inevitable, be effected by ordering the uncompensated destruction of another resource usable only for less important purposes. Thus, the apple orchards owned, by one group may be saved by the uncompensated destruction of deodors owned by another group, where their destruction was the only practicable method of controlling a disease that threatened apple-growing which constituted one of the State's important industries. The power of the State to so regulate oil and gas well operations as to prevent waste of either or both of these natural resources is unquestionable. It is not invalid to penalize the waste of natural gas by permitting it to escape into the air, even though at the time there existed no market for the permissible uses of such gas, but it was intimated that the statute would deprive the owners of oil and gas wells of their property without due process of the law, if it should result in practically denying them the right even to use the gas for any purpose whatever, because, there never would be a market for the permissible uses. The conservation of such natural resources as oil and gas and subterranean waters has been attempted in large part through legislation, regulating the correlative rights of surface owners with respect to a common source of supply of such resources. The wasteful exploitation of the common source by any such surface owner may be validly prohibited in order to prevent an injury to the rights of other surface owners in the common source of such natural resources.

37. In Barnard Schwartz on the "Constitution of the United States" Volume No. 1

at page 572 the following passage was relied, on : -

In *Geer v. Connecticut* 40 L.Ed. 793, the challenged law forbade the shipment out of the State of game killed within the State. Such law was sustained on the ground that the State itself has a peculiar property right in its wild-life. Game within a State is not, until reduced to possession, private property, but belongs to the State itself. Such game is a natural resource which is held by the State in trust for its people. "The common ownership," the *Geer* opinion declares, "imports the rights to keep the property, if the sovereign so chooses, always within its jurisdiction." The Commerce Clause does not prevent the State from prohibiting the export of such resources "which belong in common to all the people of the State", which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State.

The principle of *Geer v. Connecticut* 40 L.Ed. 793 has been applied in cases involving the conservation of other natural resources.. In *Hudson County Water Co. v. Mearns* 52 L.Ed. 828, New Jersey, reciting the need of preserving the fresh water of the State for the health and welfare of its citizens, had enacted a prohibition against transporting any water out of its streams or lakes into any other State for use therein. The High Court upheld such enactment, Justice Holmes stating simply that the case was covered in this respect by *Geer v. Connecticut* 52 L.Ed. 828.

Justice Holmes was of the same opinion in *Pennsylvania v. West Virginia* 67 L.Ed. 1177, which involved a law forbidding the transport of natural gas beyond the borders of the State until the reasonable requirements of the people of the State were satisfied. In this case, nevertheless, Justice Holmes spoke in dissent. The majority of the Court held that the *Geer* principles did not apply to an embargo on natural gas. Natural gas, said the majority unlike game, is a wholly privately owned resource. "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land."

From a strictly logical point of view, the Supreme Court's attempt to remove natural gas from the *Geer v. Connecticut* 40 L.Ed. 793, principle is not very satisfactory.

Relying on the aforesaid decisions and the text books, Mr. Chari contended that the words "material resources" occurring in Article 39 (b) mean "natural resources."

38. Mr. Chari next referred to Basu's Tagore Law Lecture? on "Limited Government and Judicial Review." He referred to passages at pages 408 to 414 in support of his contention. Therein, Basu referred to several decisions of the Supreme Court laying down the principles of interpreting the Directive Principles of State Policy contained in Chapter IV of the Constitution. We shall refer to a few of the decisions of the Supreme Court, which construed some of the provisions contained in Chapter IV.

In the *The State of Madras Vs. Srimathi Champakam Dorairajan*, , the scope of Article 46 falling under this Chapter IV came up for consideration. Article 46 was relied upon in seeking to maintain the communal Government Order fixing proportionate seats for public communities, and the contention put forward on behalf of the State was that Article 46 overrides Article 39 (2) of the Constitution. That contention was repelled by the Court. The next case in which reference to Chapter IV was made by the Supreme Court is the decision reported in the *The State of Bihar Vs. Sir Kameshwar Singh*, . Mahajan. J., at page 274 after referring to Article 39 observed as follows : -

Now, it is obvious that concentration of big blocks, of land in the hands of a few individuals is contrary to the principles on which the Constitution of India is based. The purpose of the acquisition contemplated by the impugned Act, therefore, is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals, and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve common good, as best as possible.

At page 290, Das, J. observed as follows:

It is thus quite clear that a fresh outlook which places the general interests of the community above the interests of the individual, pervades our Constitution. Indeed, what sounded like idealistic slogans only in the recent past are now enshrined in the glorious Preamble to our Constitution proclaiming the solemn resolve of the People of this Country to secure to all citizens, justice social, economic, and political and equality of status and of opportunity, what were regarded only yesterday, so to say, as fantastic formulae have now been accepted as Directive Principles of State Policy prominently set out in Part IV of the Constitution.

The ideal we have set before us in Article 38 is to evolve a State which must consistently strive to promote the welfare of the people by securing and making as effectively as it may be, a social order in which social, economic and political justice shall inform all the institutions of the national life. Under Article 39, the State is enjoined to direct its policy towards securing, "inter alia" that the ownership and control of the material resources of the community are so distributed as to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Mahajan, J., finally observed at page 311 in the connected batch of Writ Petitions as follows;-

In my opinion, legislation which aims at elevating the status of tenants by conferring upon them the bhumidars rights to which status the big zamindars have also been levelled down cannot be said as wanting in public purposes in a democratic State. It aims at destroying the inferiority complex in a large number of citizens of the State and giving them a status of equality with their former

lords and prevents the accumulation of big tracts of land in the hands of a few individuals which is contrary to the expressed intentions of the Constitution.

In *Bijay Cotton Mills Ltd. Vs. The State of Ajmer*, the Minimum Wages Act was upheld on the basis of Article 43 contained in Chapter 4 of the Constitution. In *H.M. Quarashi v. The State of Bihar* AIR 1955 S.C. 629, Article 48 of the Constitution was relied upon for supporting the impugned Act relating to the total ban imposed on the slaughter of cows and their progeny. In *In Re: The Kerala Education Bill, 1957*. Reference Under Article 143(1) of The Constitution of India, Article 45 of the Constitution was relied upon. It is thus seen that in dealing with Article 39 the tenancy legislations relating to land alone were sought to be upheld by a reference to Article 39. From this, Mr. Chari contends that Article 39 has no application to moveable property. This question has not arisen at any time before, and therefore the case is one of first impression.

39. Mr. Chad again referred to two recent enactments, viz., Coking Coal Mines (Nationalisation) Act, XXXVI of 1972 and the Indian Copper Corporation (Acquisition of Undertaking) Act, LVIII of 1972 in support of his contention. Under both the enactments, Article 39 (b) is invoked and the declaration as to policy of the State has been made. Both the enactments which invoked Article 39 (b) related to natural resources in which the community have an interest.

40. In the impugned Ordinance, the declaration as to policy of the State has been made in Clause (2)". The question, therefore, for consideration is whether it is open to the Court to examine the substance of the Ordinance and find out whether the acquisition of motor vehicles will fall under Article 39 (b). Mr. Chari again referred to the passages in Basil's Tagore Law Lectures on "Limited Government", at pages 220 and 321. The passage runs as follows : -

Due process of law, in other words, operates as a limitation upon the power of the Legislature inasmuch as the determination by the legislature of what constitutes proper exercise of police power is not final or conclusive; but is subject to supervision by the Courts.

In *Mayer v. Nebraska* 262 U.S. 390 to 400, reference was made to the American concept of "due process," originally started with a procedural content similar to the English doctrine of "by the law of the land" under the impact of economic development; the Supreme Court soon utilised the "due process" clause to assume the power of reviewing legislation from the substantive standpoint, that is to say, the reasonableness of the measure to meet the mischief at which it is aimed. In *Mayer v. Kansas* 123 U.S. 623, Harlan, J., enunciated the doctrine of substantive due process as follows : -

It does not follow at all that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State....The Courts are not bound by mere forms, nor are they misled by mere pretences. They are at liberty-indeed, are under a solemn duty-to look at the substance of thing?, whenever they enter upon the inquiry whether the

legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution.

41. Mr. Chari referred to our recent judgment in *K. Gopalachari Vs. State of Tamil Nadu*, which dealt with the validity of the Tamil Nadu Inams Estates (Abolition and Conversion into Ryotwari) Amendment Act (XXIII of 1969) at page 370. The passage referred to is as follows : -

In the guise of amending enactment, the law takes away the rights of the inamdar to get patta which vests in him under Act XXX of 1963. Mr. V.K.T. Chali who appeared for the petitioner at the later stage, contended that the impugned enactment is not a law providing for acquisition of property and consequently Article 31-A cannot be called in aid to support the impugned legislation. The learned Counsel referred to the following passage at Page 594 in Sager's Australian cases, 3rd Edition:

"Modern legislators have adopted with enthusiasm the practice of deeming things to be that which they are not, and in so far as the legislation is made by a Parliament with untrammelled powers, or within the plenary powers conferred upon a Parliament whose powers, like those of the Commonwealth Parliament, are limited by a Constitution, effect must be given to the notional conditions thereby created. But, upon a constitutional question, the Court must consider the real substance and operation of the legislation, and if in substance, and operation, it is an enforcement or step in the enforcement of existing rights and obligations, then the legislation, however disguised, is an exercise of judicial power (Vide : *Rola Co. (Australia) Proprietor, Ltd. v. The Commonwealth* 69 C.L.R. 185 at page 219.

42. The learned Advocate-General, who appeared for the State contended that the words "material resources" occurring in Article 39 (b) are wider than the words "natural resources" while according to Mr. V.K.T. Chari, they have the same meaning in the context of the entire Clause (b) of Article 39. According to the learned Advocate-General "material resources" are those made by man or by machines being the resources of the community and that road transport, being a public utility service, will fall under the expression "material resources". If the entire Clause (b) is taken into account the meaning is obvious that the material resources contemplated thereunder,, belonged to the community but owned by others whose control has become necessary to subserve the common good and, therefore, such resources have to be acquired and distributed amongst the members of the community. Mr. V.K.T. Chari, who was allergic in referring to motor vehicles in respect of which there have been legislations from 1950 in the country for nationalisation, took the example of a typewriter which is available for sale in the market. Mr. Chari said that supposing the Government wanted to acquire, say about 1000 typewriters for distribution to their staff.-he asked

whether the typewriters, which are manmade or machine-made could be acquired from the manufacturer and distributed to persons requiring them on the ground that it will subserve the common good. His contention is that the community did not own the typewriters, but that a company manufactured it, and, therefore, it cannot be said that it is a material resource belonging to the community at any time in respect of which its control and distribution has become necessary to subserve the common good. Mr. Chan's answer is that Clause (b) will be inapplicable and he contended that the same principle must apply to the case of motor vehicles, which also is movable property. The learned Advocate-General referred to the dictionary meaning of the word "resources" in support of his contention. He then referred to Lokanath Misra Vs. State of Orissa and Another, , arising under the Orissa Motor Vehicles (Regulation of Stage Carriage and Public Carriers Services Act (XXXVI of 1947) The passage referred to in the judgment of Narasimham, J., (as he then was is at page 46, paragraph 11, which runs as follows : -

It is not denied that road transport service is a public utility service. In such a service the convenience of the public and their safety must over-rule any consideration of profit to the owners of transport vehicles. From the earliest days of English Common law, it was always recognised that common carriers and other public utility undertakings require drastic State control and that they cannot be left to free competition. A public utility service must, by its very nature, involve some sort of monopoly. Doubtless under the principal Act; though monopoly was not granted to a single permit holder, the number of permit holders was limited by the issue of permits, and the principal; object of the subsidiary Act is to substitute one joint stock Company for several permit-holders throughout the State of Orissa.

Again at page 47, the learned Judge further stated as follows:

If the nature of the control exercised over public utility services in foreign countries is examined, it is found that monopoly by a State controlled agency is the order of the day. In U.S.S.R. nearly all industries are collectively owned and operated. In U.S.A. many of the public utility services, such as water-supply, gas-works, railways, electric-power plants are under public ownership. Even in Great Britain, where free competition held the field for a long time, there is a fair measure of public ownership and control of many services such as wireless, broadcasting, generation of electricity and London Transport.

In this connection, the learned Advocate-General placed considerable reliance on our recent judgment in W.P. No. 375 of 1972, etc , batch relating to the validity of the Tamil Nadu Fleet Operators and Stage Carriages (Acquisitions) Act, 1971. We upheld the enactment on the ground that the enactment was for the purposes contained in Clauses (b) and (c) of Article 39 of the Constitution. There no contention was put forward, that the requisition for stage carriages would not fall under the words "Material resources" and that "material resources", can only refer to "natural resources", as now contended by Mr. V.K.T. Chari. We, therefore,

consider that the said judgment cannot be relied upon as a considered authority supporting the contention of the learned Advocate-General.

43. The next question is whether Article 39(C) of the Constitution has any application. When instructions were sought from the President under the proviso to Article 213(1) Article 39 (c) was not referred to. Even in the Preamble part of the impugned Ordinance, no reference was made to Article 39 (c). Nevertheless, we are prepared to consider whether the impugned Ordinance could be supported with reference to Article 39 (c) of the Constitution even though the said Article had not been invoked. In this connection, it is necessary to refer to the present position of the operators in the State of Madras. In June, 1971, the State Government brought in the Tamil Nadu Ordinance, VI of 1971 by imposing the ceiling of 10 bus permits on the holding of permits, and that Ordinance was replaced by Madras Act XVI of 1971 which became law on 30th July, 1971. In regard to operators holding 50 or more permits, the Government enacted the Madras Act XXXVII of 1971 whose validity was upheld by us in W.P. No. 375 of 1972, against which an appeal in the Supreme Court is pending. The position now is that there is none in the State of Madras, who owns more than 50 permits and the ceiling has been fixed at 10. It cannot be said there is so much of wealth concentrated in a 10 bus operator disturbing the economy of the country. Further the Government in the counter have not asserted that they have investigated into the wealth of the operators holding 10 buses and come to the conclusion that there is concentration of wealth in them attracting Articles 39 (c). As observed by us, most of the buses were purchased under the hire-purchase agreement, and it normally takes about 3 years to become the owner of the vehicle after discharging the liability under the hire purchase agreements, by which time half the life of the motor vehicle is gone, taking into account the heavy taxation of motor vehicles and payment of other taxes, such as Income Tax etc. On their income and the cost of maintenance, any appreciable income leading to concentration of wealth could never occur in a 10 bus operator. Further, if Article 39 (c) is literally construed, future concentration of wealth is alone sought to be prevented, and as observed above we cannot conceive of any concentration of wealth in a 10 bus operator. We are, therefore, of opinion that Article 39 (C) of the Constitution also cannot be relied upon in support of the Ordinance.

44. Thus, we find that there is no nexus between the impugned Ordinance and the purposes mentioned in Article 39 (b) and (c). The result of holding that Article 39 (b) and (c) cannot be invoked in the present case is that the validity of the Ordinance could be challenged under Articles 14 19 and 31 of the Constitution. Mr. V.K.T. Chari stated that for the purposes of this case, he is not challenging the validity of Article 31 (c) in this Court, and that this does not mean that it is not open to the petitioners and other operator to question the validity of Article 31 (c) in this Court or in the Supreme Court in other proceedings. We are, therefore, proceeding for the purpose of this case, on the basis that Article 31 (c) is valid subject to the reservation of the request made by

Mr. Chari.

45. Before taking up the question as to how far the impugned Ordinance offends Articles 14, 19 and 31 of the Constitution, we have to consider the question whether the President's assent under Articles 31 (3) and 254 (2) was validly obtained. This question was argued by Mr. Chari from various angles, and although we are not expressing our final opinion on this question in view of the subsequent events, viz., the Ordinance being replaced by an Act, nevertheless, we propose to deal with the question. Proviso to Article 213 (1) makes it obligatory on the part of the Governor in promulgating an Ordinance to obtain instructions from the President in case the Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof in the Legislature, or he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President. In promulgating an Ordinance when both the Houses of Legislature are not in session and the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, the Governor may promulgate such Ordinance under Article 213 (1) as the circumstances appear to him to require, and the proviso makes it clear under what circumstances instructions of the President would be necessary to promulgate such an Ordinance. On the question of satisfaction of the Governor, Mr. Chari referred us to the decision of the Privy Council in *Rosselunis v. Panadopoulos* (1958) 2 All E.R. 23, wherein Lord Morton, held that the test is a subjective test. Acting under Article 213 (1) of the Constitution it would appear that the instructions from the President under Article 213 (1) were requested as disclosed in the letter, dated 24th November, 1972, addressed on behalf of the State Government to the Secretary to the Government of India, Ministry of Home Affairs, New Delhi. In view of the importance of the question raised, we shall set out the letter which was filed as Annexure "" A " to the reply affidavit of the petitioner : -

Sub : - Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Ordinance, 1973-Instructions from the President-Reg.

I am directed to forward herewith a copy of the Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Ordinance, 1972, which is proposed to be promulgated by the Governor.

2. The Ordinance in terms of legislation will fall mainly within the scope of the following entries of the Concurrent List in the Seventh Schedule to the Constitution, namely : -

CONCURRENT LIST:

Entry 42 : Acquisition and requisitioning of property.

Entry 35 : Mechanically propelled vehicles....

and will be intra vires the State Legislature. Therefore, the Governor is competent to promulgate the Ordinance.

3. Clause 4 of the proposed Ordinance provides for the vesting of Stage Carriages and contract carriages in the Government on and from a date to be notified by the Government in this behalf. Clause 5 specifies, the principles and the method of determining the amount for the acquired property. Clause 11 provides for the manner of payment of the amount for the acquired property. These provisions of the draft Ordinance may be said to attract Clause 2 of Article 31 of the Constitution. A Bill containing provisions similar to the provisions of the draft Ordinance referred to above will have to be reserved for the consideration of the President under Clause 3 of the Article 31 of the Constitution. Therefore, the instructions from the President under the proviso to Clause 1 of Article 213 of the Constitution is necessary for the promulgation of the Ordinance by the Governor.

4. Clause 23 of the Ordinance excludes the jurisdiction of civil Court in respect of any matter in which the Government or an arbitrator or authorised officer is empowered by or under of India (sic) Ordinance to determine. this provision may be said to be repugnant to the provisions of an existing law on a concurrent subject, namely, Code of Civil Procedure, 1908 (Central Act V of 1908). Clause 31, overrides the provisions contained in the Motor Vehicles Act, 1939, (Central Act IV of 1939) or any other law for the time being in force. This provision may be said to be repugnant to the existing law on a concurrent subject, namely, Motor Vehicles Act, 1939 (Central Act IV of 1939). A Bill containing provisions similar to the provisions of the Ordinance referred to above, will have to be reserved for the consideration of the President under clause 2 of Article 254 of the Constitution. Therefore, the instructions from the President under the proviso to Clause 1 of Article 21 of the Constitution will be necessary.

5. In view of the position stated above, the instructions from the President under the proviso to Article 213 (1) of the Constitution is necessary for the promulgation of the proposed Ordinance by the Governor. I am therefore, directed to request that the instructions from the President for the promulgation of the above Ordinance may kindly be obtained and communicated to this Government as expeditiously as possible, and if necessary by telegram so as to enable this Government to promulgate the Ordinance very early.

The reply dated 27th December, 1972 received from the Government of India, Ministry of Home Affairs runs as follows : -

ORDER.

In pursuance of the proviso to Clause (i) of Article 213 of the Constitution, the President approves the promulgation, by the Governor of Tamil Nadu of the Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Ordinance, 1972.

By order and in the name of the President.

(Sd.) B. Shukla.

"(Deputy Secretary to the Government of India.)

The above is the first stage for the promulgation of the Ordinance . It may be seen that the President's assent under the Constitution is required in the following cases : (1) Article 31 (3) when a law referred to in Article 31 (2) has been reserved for consideration of the President; (2) Article 31-A first proviso, where a law falling under Article 31 -A relating to acquisition of estates is made by the Legislature of a State; (3) Under Article 254 (2) when there is an inconsistency between the laws made by Parliament and laws made by the Legislature of a State. The instructions under the proviso to Article 213 takes the place of the previous sanction of the Governor-General under Sections 32 and 75 of the Government of India Act, 1935. The Government of India Act, 1935, contains the Instrument of Instructions to the Governor-General and also the Governor. The relevant Articles in this context are Articles 26 and 27 of the Instrument of Instructions to the Governor-General. Article 26 runs as follows : -

In considering whether he shall give his assent to any Provincial Law relating to a matter enumerated in the Concurrent Legislative List, which has been reserved for his consideration on the ground that it contains provisions repugnant to the provisions of a Federal Law, our Governor-General, while giving full consideration to the proposals of the Provincial Legislature, shall have substantially the broad principles of these codes of law through which uniformity of legislation has hitherto been secured.

Similarly, Articles 16 and 17 of the Instrument of Instructions issued to the Governor of Madras, relate to giving his assent or withholding his assent from any Bill passed by the provincial Legislature. Tracing the history of the Constitutional provisions relating to assent, Mr. Chari, contended that the President must consider all relevant matters in giving his assent, and if the State Government had made any representations in the communication sent to him, which are untrue, or omitted to make a representation which they were bound to refer, that would affect the validity of the assent. The further contention of Mr. Chari, is that a misrepresentation will stand in the same footing as a failure to represent the relevant material in the communication from the State Government to the President. According to him, the failure in the letter to refer to the hire-purchase financiers, who are the real owners, whose rights are ignored, and the non-reference to the Hire-Purchase Act, 1972, and the non-reference to the definition of " Owner " u/s 2 (19) of the Motor Vehicles Act, 1956, and the failure of the Transport Secretary in not drawing attention of the Home Secretary to "Article 31 (c) or Article 39 (c) all these vitiate the assent, and therefore, the Ordinance is bad.

46. The learned Counsel in this connection, referred to Kerr on "Fraud and Mistake ", Sixth Edition, pages 51; and 52, and Craies on " Statute Law"

Seventh Edition, page 41. The next decision referred to was Sri Vedaranyaswaraswami Devastanam and Others Vs. State of Madras and Others, , where the constitutional validity of the Madras Inams (Assessment) Act (XL of 1956) was questioned, and particularly the contention therein was that the assent of the President was obtained to a colourable legislation. The Advocate General, who appeared for the State placed all the relevant materials to show the circumstances attending to the President's assent, and Ramachandra Iyer, C. J., and Ananthanarayanan, J., as he then was, were satisfied with the fullest disclosure of all materials placed before the Court. The learned Counsel next referred to Subbachariar and Ors. v. State of Madras (1967) 1 M.L.J. 206 : 80 L.W. 184, to which one of us was a party, where Natesan, J., who delivered the judgment on behalf of the Bench observed at page 216 as follows : -?

We agree with learned Counsel that reservation of a Bill for consideration and assent by the President is not a mere matter of form. As we see it, it is an essential and important part of the machinery of law-making set up by the Constitution. Bearing in mind the practice that had been obtaining in Constitutions of the Colonies and-Dominions of the British wealth, including the Constitution under the Government of India Act, 1935, we think it may be safely assumed that when a Bill is reserved by a Governor of a State for consideration of the President, the Bill will be examined by the Law Advisers of the President.

Natesan, J., at page 217, referred to the classic treatise, of Spenser Bower on Actionable Non-disclosure. At page 218, the learned Judge observed as follows : -

There is nothing in the light of the said principle to suggest that the reservation of the Bill for the President's assent and the securing of the President's assent to the Bill is in any manner vitiated, even assuming that Courts could go behind the assent once given by the President. But, as pointed out by Mahajan, J., (as he then was) in Raja Suriya Pal Singh v. The State of Uttar Pradesh 1952 S.C.J. 354 : AIR 1952 S.C. 25, it is the subjective opinion of the President that leads to the assent and it is not justiciable. The learned Judge observes:

The difference is that persons whose properties fall within the definition of the expression "Estate" in Article 31-A are deprived of their remedy, under Article 32 of the Constitution, and the President has been constituted the sole Judge of deciding whether a State law acquiring estates under compulsory-power has, or has not, complied with the provisions of Article 31 (2). The validity of the law in these cases depends on the subjective opinion of the President and is not justiciable. Once the assent is given the law is taken to have complied with the provisions of Article 31 (2).

In our view, though the broad principles on which the assent is intended to be given or withheld from a reserved Bill may be deducible, they are not specifically laid down in the Constitution. That being so, it will not be open to the Courts to question the propriety of the President's action.

47. Mr. V. K. T. Chari then contended that Articles 254 (2) read with the

Instrument of Instructions, referred to above, as also Section 107 of the Government of India Act, 1935, show that the object of obtaining the President's assent to an enactment is to have a uniform code throughout the country. Article 44 which also falls under Chapter IV providing that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India, was next referred to. Article 254 (4) (2) of the Constitution of India, runs as follows:

Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including" a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Entry 35 in List III of the Seventh Schedule of the Constitution relates to "Mechanically propelled vehicles in hiding the principles on which taxes on such vehicles are to be levied", and this entry corresponds to Entry 20 in List III of the Government of India Act, 1935. It is under this legislative head that the Parliament enacted the Motor Vehicles Act and the amending Act in 1956 introducing Chapter IV-A in the main enactment. Under the same legislative head, the impugned Ordinance has been promulgated. We are not on the question of repugnancy between the State enactment and the Parliamentary enactment. Mr. Chari, contended that the President's assent under Article 254 (2) of the Constitution is not a formal matter, and in this context he referred to the speech made by Sir Alladi Krishnaswami Ayyar, when Article 44 was considered by the Constituent Assembly. Sir Alladi Krishnaswami Ayyar, said as extracted from the Memorandum on the Directive Principles of the Indian Constitution at page 108, as follows : -

Thus there could be no real objection to the Article as it ran. A civil code runs into every department of civil relations, to the law of contracts, to the law of property, to the law of succession, to the law of marriage and similar matters. How can there be any objection to the general statement here that the States shall endeavour to secure a uniform code throughout the Territory of India ?

As to the argument that religion was in danger and that communities could not live in amity if there was to be a uniform code the said Article actually aimed at amity. The idea was that differential systems of inheritance and matters were some of the factors which contributed to the difference among the different peoples of India. By the introduction of a common code it was attempted to arrive at a common measure of agreement in regard to those matters. It was not a case of one legal system influencing or being influenced by another legal system. He also said that our ancients did not think of a unified nation to be

welded together into a democratic whole and the object of this Article was to help welding together into a single nation.

48. A few decisions and references to some text books were then made on the extent of the Court's power in scrutinising assents. A question arose whether Section 3 (1) of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949, is repugnant to Section 22-B of the Indian Electricity Act, 1910, and Section 49 of the Electricity (Supply) Act, 1948, and whether in case of a conflict between the exclusive and concurrent fields of legislation, the latter, under the scheme of distribution should prevail. In W.P.No. 1420 of 1969 etc., batch, to which one of us was a party this question of the President's assent owing to a repugnancy was raised. It was held therein that there was no such repugnancy, and therefore, the further question of the check of the President's assent did not become necessary to be considered. My Lord, the Chief Justice, who delivered the Judgment on behalf of the Bench, observed as follows:

So, if there is at all, a trenching upon the subject "Electricity", or overlapping on that subject, the question to be asked is whether the trespass or overlapping is such as to show that the pith and substance of the 1939 Act, deals with "Electricity". We have no doubt that from that standpoint, the 1949 Act is not law on Electricity. On that view, the validity of the 1949 Act has to be upheld without any necessity to examine whether the President's assent cures the repugnancy on the assumption that the 1949 Act is a legislation touching the Concurrent field.

49. In this connection, Mr. Chari, referred to page 103 of the " Limited Government and Judicial Review" by Dr. Durga Das Basu. The passage relied upon ran as follows : -

It has been said thus, that the Courts will not inquire whether the votes were correctly counted-(Keith, Introduction to British Constitutional Law (1931), page 125), or whether the royal assent was obtained erroneously or even fraudulently-Halsbury, 3rd Edition volume 36, para. 560 f.n. (a)-(b). As late as 1941, Viscount Simon, in the Privy Council, had observed : -

It is not open to the Court to go behind what has been enacted by the Legislature, and to inquire how the enactment came to be made, whether it arose out of incorrect information, or, indeed, an actual deception by someone on whom reliance was placed by it.

" In view of the foregoing decisions, Hood Phillips goes to the extent of holding that even where there is a statutory requirement that a special majority is required for some legislation, " Courts would not concern themselves" with the question whether a statute has been passed with that specified majority, once the royal assent has been obtained and endorsed. This may be true so far as England is concerned, but would not be correct in relation to countries having written constitutions which require a special majority for certain purposes, e.g., under Article 368 of the Constitution of India,-in view of the Privy Council

decision from Ceylon and the South African cases cited earlier. And, once it is held that the Court can examine whether the Bill was passed by the Special Majority required by the Constitution, a Speaker's Certificate to the effect merely that the Bill was " passed ", may not preclude the Court from further inquiry whether the passage was by a Special majority, for, according to the Ceylon decision, which was not cited in the case from Sierra Leone, *Aka v. A. C. of Sierra Leone* (1969) 3 All E.R. 384 . passage by an ordinary majority, in such cases, would be a nullity.

Again at page 105, Basu stated as follows : -

Article 31 (3) and the second proviso to Article 200 require the Governor to reserve certain Bills for the consideration of the President. A breach of this obligation by the Governor would invalidate a State Act which may have been passed with the assent of the The State of Bihar Vs. Sir Kameshwar Singh, , State of Madras v. Namasivaya 1965 S.c. 190 : (1965) 2 S.C.J. 563, without the assent of the President ; for, the reservation and the assent of the President, as required by these Articles, are conditions precedent to the validity of such legislation and not matters of procedure only.

" Of course, the Supreme Court has held that when the President has assented to an amending Act under Article 31 (3), his assent to the parent Act may be presumed - *Venkata Rao Esajirao Limbekar and Others Vs. The State of Bombay and Others*, . This decision is, however, to be read with the following caution:

(a) " In the case before the Supreme Court, the question of lack of reservation or of assent of the President to the parent Act had not been raised before the High Court and there were no materials on this point before the Supreme Court, and that is why the Supreme Court made the obiter. If the assent of the President had been accorded to the amending Act, it would be difficult to hold that the President had never assented to the parent Act, etc."

(b) " The decision of the Andhra Pradesh High Court in *Inamdars*" case, *Jnamdars v. Government of Andhra Pradesh* AIR 1961 A.P. 526 : (1961) 2 A. W.R.60 having been referred to, but not overruled by the Supreme Court, would lead to the conclusion that the Supreme Court affirmed the view that the requirement in Article 31 (3) was a condition precedent to the validity of the legislation. Hence, if the parent Act is a post-Constitution legislation to which Article 31 (3) was attracted, the subsequent reservation of an amending Act would not cure the invalidity, ab initio of the parent Act, for violation of Article 31 (3).

But a recital of assent by the President may raise a presumption of reservation by the Governor *Salubai v. Chanddu* AIR 1965 Bom. 194 , We will now refer to a passage in *Halsbury's Laws of England*, Third Edition, Volume 36, page 378, para. 560, cited by the learned Counsel.

The legislative supremacy of Parliament implies not only the inability of the

Courts to question its power to enact any particular statutory provision, but also their duty to give effect as statutes only to enactments answering to that description. It follows that the Courts can become concerned with the question whether a particular document which they are invited to apply has received the consent necessary to constitute it an Act of Parliament. The Courts would not, for example, give effect to a document appearing on its face to have been agreed by the Lords and Commons alone. In statutes passed since the latter part of the Fifteenth Century, the giving of the necessary consent is, however, recited in the enacting formula, and the question of sufficiency of consent has arisen only in relation to earlier documents containing such recital, and must in practice, be taken to be confined to such documents. While the question of sufficiency of consent may be open to the Courts, that of regularity of consent is not. If a Bill has been agreed to by both Houses of Parliament, and has received the royal assent, it cannot be impeached in the Courts on the ground that its introduction, or passage through Parliament, was attended by any irregularity or even on the ground that it was procured by fraud.

In this connection,, Mr. Chari, referred to Berridale Keith on " Responsible Government in the Dominions ", Vol. II, page 1047, dealing with control over dominion legislation, and also to Wynes on " Legislative, Executive and Judicial Powers in Australia " (3rd Edn.), page 123. A reference to *Tennant v. Union Bank of Canada* 1894 A.C. 31 was also made where the Privy Council held that the dominion legislation is paramount in considering Section 109 of the British North America Act.

50. The learned Advocate-General, however, contended that a copy of the draft Ordinance having been sent to the President along with the letter of the Transport Secretary, it is a sufficient compliance.

51. Regarding the instructions from the President required for promulgation of an Ordinance under the proviso to Article 213(1), the learned Advocate-General contended that what the President is required to do is to say whether he assents or does not assent to the promulgation of the Ordinance on a consideration of the materials sent to him by the State Government and that there is no procedure prescribed in regard to the granting or withholding the assent. In this connection, the learned Advocate-General referred to Annexure " B " filed along with the reply affidavit of the Petitioner and contended that the requirement of the law has been substantially complied with. He then referred to a few decisions and contended that the grant of assent is not a matter for judicial review. The first case cited by the learned Advocate-General in support of his contention was *M.K. Subbachariar and Ors. v. State of Madras* 80 L.W. 184 : (1967) 1 M.L.J. 206, already referred, to, to which one of us was a party. Natesan, J., who delivered the judgment on behalf of the Bench referred to Article 212 of the Constitution and dealt with the question as to the regularity of the procedure in obtaining the assent. The passage relied on is at page 193, which runs as follows : -

Article 212 of the Constitution only precludes Courts from enquiring into the validity of any proceedings in the Legislature on the ground only of any alleged irregularity of procedure. The contention of Counsel, as we understand is that the impact of the Bill in its full force would have been obvious to the President from its language and that the possible repercussions of the Bill in regard to compensation and other features must have been brought specifically to the notice of the President. Now, apart from the terms of the Bill, there could have been no assurance as to compensation, and the Bill in its final form was before the President. Learned Counsel said that as the provisions of the Bill were confiscatory in character, the assent should have been given. But, the argument overlooks that the very purpose of reserving the Bill under Article 31-A, for the President's assent is to cure its invalidity. It must be in the consciousness that the Bill would be attacked as void being in contravention of Articles 14, 19 and 31, that the Bill is submitted to the President for his assent under Article 31-A. Assent under Article 31 (3) gives a sanction for some limited inroads on property rights. Assent under Article 31 -A gives greater, even practically full cover, Articles 14, 19 and 31 being taken out of the way. This protective Article proceeds on the basis that the law may be void as inconsistent with or taking away or abridging the rights conferred under Articles 14, 19 and 31. The President, of course, is expected to consider the law and assent, and it has to be presumed that the President has done so. The President may declare either that he assents to the Bill, in which case the Bill becomes law, or that he with holds assent therefrom in which case the Bill falls through, unless the procedure indicated in the proviso to Article 20.1 is followed.

He next referred to W.P. No. 1420 of 1968 etc., batch, already referred to earlier, delivered by one of us, and the following passage was relied upon.

But, we would like to point out that for the 1949 Act, the Governor-General's assent had been obtained as a matter of fact, and for every subsequent Act extending its life, the assent of the President had been obtained, whether it was required or not. It has been suggested to us that the invalidity of the Act with reference to certain aspects had not been placed before the President, and his assent cannot be said to cover these aspects as well. The true view on this matter has been expressed by a Division Bench of this Court, to which one of us was a party, in *M.K. Subachariar v. State of Madras* 80 L.W. 184 : (1967) 1 M.L.J. 206. It was argued that the true effect of the Act there in question had been kept masked and veiled from the President, and his assent to it was of no effect. In repelling this contention, the Court said:

The President may be expected to examine with all the facilities at his disposal the effect and extent of transgression of the constitutional rights guaranteed, when protection is sought for such transgressionThe President must be presumed to have fully acquainted himself with the whole scope of the Bill and its full implications.

The learned Advocate-General further referred to a passage at page 195 in *K.C.*

Gajapati Narayan Deo and Others Vs. The State of Orissa, , wherein it was stated that the President's assent is clearly a part of the legislative process and is immune from the scrutiny of the Court on any such ground.

52. The last decision cited in this context was Sankarasana Ramanuja Das v. State of Orissa AIR 1957 Ori 96 where Narasimham, C.J., who delivered the judgment on behalf of the Bench after referring to the judgment of the Supreme Court in The State of Bihar Vs. Sir Kameshwar Singh, observed as follows:

Their Lordships further pointed out that the only provisions empowering the President to assent to a Bill passed by a State Legislature, is contained in Article 201 of the Constitution and that there can be no question of the President assenting to a piece of State Legislation which has previously been assented to by the Governor or himself. Clauses (3) and (4) of Article 31 and the Proviso to Article 31-A deal with the consequences flowing from the President's giving his assent to a piece of State Legislation which has previously been assented to by the Governor or himself. Clauses (3) and (4) of Article 31 and the Proviso to Article 31-A deal with the consequences flowing from the President's giving his assent to a Bill passed by a State Legislature relating to acquisition of estates. But, these clauses do not by themselves empower the President to give his assent to any Bill. Consequently, there can be no further scrutiny of the assent, already given by the President, to a Bill relating to such acquisition, with a view to find out whether such assent was given either under Clause (3) or Clause (4) of that Article, or under the proviso to Article 31-A.

53. We agree with the observations in Subbachari's case 80 L.W. 184 : (1967) 1 M.L.J. 306 that the assent of the President is not a formal requirement, but an essential and important part of the machinery of law-making, set up by the Constitution and that its object is to secure a uniform civil Code envisaged by Article 44 of the Constitution. However, we are not finally expressing our opinion whether on the facts of this case, the President's assent was, in any way, vitiated by reason of the fact that the impugned Ordinance has been replaced by an Act

54. We shall next take up for consideration the attack on the Ordinance under Article 19 (1) (g) of the Constitution of India. Article 19 (1) (g) confers on a citizen the right to practise any profession or to carry on any occupation, trade or business subject to the restrictions contained in Article 19 (6) of the Constitution of India which was amended by the Constitution (First Amendment) Act, 1951. We may at the outset state that Article 19 (1) (g) confers a right and not an obligation. The right to carry on the business implies a right of the owner of the business to carry on the same in the manner that he likes, including the right to close down when he so chooses, if such business does not yield any profit. There cannot, however, be a trade or business in immoral or criminal activities and such activities can be totally prohibited. If a right is claimed under Article 19, the first requisite is that he must be a citizen who alone can complain of a violation of his right, and if an enactment is challenged as infringing such right, it must be

established that he has a legal right and that it is a fundamental right. Reasonable restrictions are imposed on the exercise of that right under Article 19 (6) of the Constitution of India. The question, therefore, to be considered is whether the creation of a monopoly would fall within the meaning of "reasonable restrictions" on the carrying on of a trade or a business. The question arose for consideration under Article 19 (6) for the first time in the Supreme Court in *Saghir Ahmad Vs. The State of U.P. and Others*, . The monopoly there impugned was in road transport. The Court held that no material had been placed before them to justify the monopoly. The monopoly imposed was an unreasonable restriction and therefore void and that the first amendment to the Constitution was not retrospective. Mukherjea, J. however, held that the case before him had to be decided on the unamended Article and he added that if the case had to be decided after the first amendment the monopoly could not be impugned as violating Article 19(1)(g).

55. In *Akadasi Padhan v. State of Orissa and Ors.* 1963 S.C. 104 : (1964) 2 S.C.J. 37 the question arose whether the creation of a monopoly in connection with the provisions of the Orissa Kendu Leaves (Control of Trade) Act, was valid. There, the petitioner owned about 80 acres of land on which he grew Kendu leaves which are used in the manufacture of beedies. Since the Act came into force, the State acquired the monopoly in the trade of Kendu leaves and the petitioner challenged the Act as contravening Article 19 (1) (f) and (g). Three questions were considered by the Supreme Court, viz., (1) what is the effect of the amendment made in Article 19 (6) by inserting sub-Article (2) in Clause (6), (it) what is the nature of the law which is covered by Article 19 (6) (it) ; and (3) whether Article 19 (6) (ii) authorises a State to employ agents other than the Departments of Government. Gajendragadkar, J., (as he then was) in delivering the judgment on behalf of the Court observed as follows in paras. 13 and 14, at pages 1053 and 1054:

In attempting to construe Article 19 (6), it must be borne in mind that a literal construction may not be quite appropriate. The task of construing important Constitutional provisions, like Article 19 (6) cannot always be accomplished by treating the said problem as a mere exercise in grammar. In interpreting such a provision, it is essential to bear in mind the political or the economic philosophy underlying the provisions in question, and that would necessarily involve the adoption, of a liberal, and not a literal and mechanical approach to the problem. With the rise of the philosophy of socialism, the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the generalisation of social welfare. To the rationalist, nationalisation or State ownership is a matter of expediency dominated by considerations of economic efficiency and increased output of production. This latter view supported nationalisation, only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very much influenced by

these considerations, and treated it as a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output.

The amendment made by the Legislature in Article 19 (6) shows that according to the Legislature, a law relating to the creation of State monopoly should be presumed to be in the interests of the general public. Article 19 (6) (ii) clearly shows that there is no limit placed on the power of the State in respect of the creation of State monopoly. The width of the power conferred on the State can be easily assessed if we look at the words used in the clause which covers trade, business, industry or service. It is true that the State may, according to the exigencies of the case and consistently with the requirements of any trade, business, industry or service, exclude the citizens, either wholly or partially. In other words, the theory underlying the amendment, in so far as it relates to the concept of State monopoly, does not appear to be based on the pragmatic approach which socialism accepts. That is why we feel no difficulty in rejecting Mr. Pathak's argument that the creation of a State monopoly must be justified by showing that the restrictions imposed by it are reasonable and are in the interests of the general public. In our opinion, the amendment clearly indicates that State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of the general public, so far as Article 19 (1) (g) is concerned.

The learned Judge observed at page 1054, para. 17 as follows : -

If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only these essential and basic provisions which are protected by the latter part of Article. 19 (6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19 (6). In other words, the effect of the amendment made in Article 19 (6) is to protect the law relating to the creation of monopoly, and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Article 19 (6) and would inevitably have to satisfy the test of the first part of Article 19 (6).

In paragraph 20, the learned Judge further observed as follows:

Therefore in dealing with the attack against the validity of a law creating State monopoly on the ground that its provisions impinge upon the other fundamental rights guaranteed by Article 19(1), it would be necessary to decide what is the

purpose of the Act and its direct effect. If the direct effect of the Act is to impinge upon any other right guaranteed by Article 19 (1), its validity will have to be tested in the light of the corresponding clauses in Article 19.

The learned Judge gave an illustration in paragraph 22 that the State monopoly in respect of road transport or air transport would not normally infringe the citizens' fundamental right under Article 19 (1) (f) and that similarly a State monopoly to manufacture steel, armaments, or transport vehicles, or railway engines and coaches may be provided for by law which would normally not impinge on Article 19 (1) (f). In paragraph 23, the learned Judge observed that the price fixation is not an essential part of monopoly in trade and must stand on its reasonableness test. The Supreme Court answered the first question set out above, on a correct interpretation of Article 19 (6) holding that the requirement of reasonableness applies to the first part and does not apply to Sub-clauses (i) and (ii) of the second part ; on the second question, the Supreme Court held that the words " the law in relation to a monopoly " must mean only those parts of the law which are absolutely essential for the creation of a monopoly and that the other provisions in such a law must, however, satisfy the test of the first part of Article 19 (6), and on the last question, the Supreme Court upheld the validity of the section which provided for the appointment of agents.

The amendment to article 19 (6) has been considered in several cases. In *Ramachandra v. State of Orissa* 1956 S.C. 298 relating to ousting of private stage carriage services and creating a monopoly in favour of the State or a Corporation owned or controlled by the State, the right of the State to carry on trade or business has been recognised under Article 298 of the Constitution and the authority to exclude competitors in the field of such trade or business was derived from Entry 21 of List 3 of the Seventh Schedule and the exercise of that powers was protected under Article 19 (1) (g) or Article 19 (6) (ii).

56. We shall now briefly refer to some of the bus nationalisation cases. In *Deepchand v. State of Uttar Pradesh and Ors.* AIR 1956 S.C. 648, the Supreme Court upheld the validity of the U.P. Transport Service Development Act, (IX of 1955), having regard to the entire scheme of compensation provided by the Act for the interests acquired within the meaning of Article 3 (2) of the Constitution. We may refer to Section 12 of the impugned enactment which provided that the State Government, may, if the holder of a permit offers to sell, choose to purchase the motor vehicles covered by the permit upon terms and conditions laid down in Schedule 2, provided that the vehicle is of a type and model notified by the State Government and that the vehicle is in a mechanically sound condition and declared fit by the Transport Commissioner or his nominee. In *The Parbhani Transport Co-operative Society Ltd. Vs. The Regional Transport Authority, Aurangabad and Others*, , Sarkar, J. in delivering the Judgment on behalf of the Bench,, observed at page 805 as follows : -

It also seems to us that there is nothing in our law to prevent the Government from entering a business in competition with private citizens. Indeed, Article 19

(6) by providing that nothing in Article 19 (1) (g) shall affect the application of any existing law in so far as it relates to, or prevents the State from making any law relating to the carrying on by the State of any trade, business, industry or service whether to the exclusion, complete or partial, of citizens or otherwise would seem to indicate that the State may carry on any business either as a monopoly, complete or partial, or in competition with any citizen and that would not have the effect of infringing any fundamental rights of such citizen.

In H.C. Narayanappa and Others Vs. The State of Mysore and Others, , Shah, J. as he then was, who delivered the judgment on behalf of the Bench observed at page 1970 as follows : -

If the argument of the petitioners and the intervener that legislation relating monopoly in respect of trade and industry is within the exclusive competence of the State, be accepted, the Union Parliament cannot legislate to create monopolies in the Union Government in respect of any commercial or trading venture even though power to carry on any trade or business under a monopoly is reserved to the Union by the combined operation of Article 298 and the law which is protected from the attack that it infringes the fundamental freedom to carry on business by Article 19 (6). We are, therefore, of the view that Chapter IV-A could competently be enacted by Parliament under Entry No. 21 read with Entry No. 35 of the Concurrent List.

The plea sought to be founded on the phraseology used in Article 19 (6) that the State intending to carry on trade or business must itself enact the law authorising it to carry on trade or business is equally devoid of force. The expression " the State " as defined in Article 12 is inclusive of the Government and Parliament of India and the Government and the Legislature of each of the States. Under Entry No. 21 of the Concurrent List, Parliament being competent to legislate for creating commercial or trading monopolies, there is nothing in the Constitution which deprived it of the power to create a commercial or trading monopoly in the constituent States Article 19 (6) is a mere saving provision : Its function is not to create a power, but to immunise from attack the exercise of legislative power falling within its ambit. The right of the State to carry on trade or business to the exclusion of others does not arise by virtue of Article 19 (6). The right of the State to carry on trade or business is recognised by Article 298 ; authority to exclude competitors in the field of such trade or business is conferred on the State by entrusting power to enact laws under Entry 21 of List III Seventh Schedule and the exercise of that power in the context of fundamental rights is secured from attack by Article 19(6).

We shall next refer to the judgment in Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, , Subba Rao, J. as he then was who delivered the judgment on behalf of the Bench after referring to the Saghir Ahmad Vs. The State of U.P. and Others, and the The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, observed at p. 316 as follows : -

The Legislature can only make laws within its legislative competence. Its legislative entries are limited by Fundamental Rights created by the Constitution. The legislature cannot overstep the field of its competency, directly or indirectly. The Court will scrutinize the law to ascertain whether the legislature by device purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it. If, in fact it has power to make the law, its motives, in making the law are irrelevant.

The learned Judge observed at page 317 as follows : -

Looking at the business not simply from the stand-point of the right to do it or the activity involved in it, but also from the stand-point of its assets, it becomes clear that the assets pertaining to the business of the quandom permit-holder are transferred to the State Transport Undertaking. Though the cancellation of the permit has the effect of crippling his business, none of the assets of the business is taken over by the State Transport Undertaking ; he is left in the possession of the entire assets of the business. It is no doubt true that in the context of the scheme of nationalisation, he may not be able to make use of his assets in other routes or dispose of them at a great advantage to himself. But, it cannot be said that by cancelling the permit, what is left with him is only the business and the State Transport undertaking has not taken over the same.

The next decision referred to is Kumaon Motor Owners" Union Ltd. and Another Vs. The State of Uttar Pradesh, , where Rule 131 (2) (gg) of the Defence of India Rules, 1962, came up for interpretation. There, routes on border areas were taken over for operation by Government buses in the interest of the security under the Defence of India Act by cancelling the permits of private operators under the impugned rules. Its validity was questioned, and Wanchoo, J., as he then was, in delivering the judgment on behalf of the Bench observed as follows at page 790 : -

Then, it is urged that by passing the impugned order, the commercial undertaking of the union is destroyed and that this could not be the intention behind Clause (gg) of Rule 131 (2) of the Rules. We are of opinion, that in this case, there is no destruction of the commercial undertaking of the union, for the simple reason that it is not disputed that this is. not the only route on which the union is plying its vehicles and the impugned order does not touch the other routes on which the appellants may be plying their vehicles. Further, there is nothing in the order which destroys the commercial undertaking even otherwise, for it has neither taken over any of the assets of the commercial undertaking, nor has it in any way interfered with the working of the commercial undertaking ; all that the Order provides is that the Union shall not ply its vehicles on a particular route. This, in our opinion, does not amount to destroying the commercial undertaking which is left untouched by the Order. All that may be said to have resulted from the Order is that the profit-making capacity of the commercial undertaking might have been reduced to a certain extent. That, however, does not, in our opinion, mean that the commercial undertaking was

lost due to one line of business being stopped; that would not amount to destruction of the commercial undertaking which could take up other business. So long as the Order under Clause (gg) of Rule 131 (2) comes within the terms of that clause, it will be good even though it may diminish the profit-making capacity of a commercial undertaking or even reduce it to nothing in a particular line of business. We are, therefore, of opinion that the impugned Order is in accordance with the terms of Clause (gg), Sub-rule (2) of Rule 1 and cannot be said to go beyond the powers conferred on the State Government by that clause.

The learned Judge at page 792 further observed that there can be no doubt that the necessary satisfaction of the State Government which is a condition precedent for the issue of an order under the rules was there, before the impugned Order was issued.

58. We shall now refer to *Rashbihari Panda etc. Vs. State of Orissa*, which relates to the Government monopoly for the sale of Kendu leaves under the Orissa Kendu Leaves (Control of Trade) Act (XXVIII of 1961). The State Government of Orissa in exercise of the powers conferred by Section 10 of the Act decided to invite offers for advance purchase of Kendu leaves only from persons who purchased these leaves from individual units during the previous year and who acted as purchasers without default and to the satisfaction of Government, and the method of sale by open competition was given up. The Government also turned down an offer made by the petitioner. The question arose whether the action of the Government was violative of Articles 14 and 19. Shah, J., in delivering the judgment on behalf of the Bench held that the action of the Government was not valid in law and the petitioner's fundamental rights were violated. The learned Judge referred to Articles 19 (.1) (f) and 19 (1) (g) and the prior decision of the Supreme Court in *Akadasi Padhan Vs. State of Orissa*, and held:

If the monopoly of purchasing kendu leaves by Section 3 is valid, in so far as it is intended to be administered only for the benefit of the State, the sale or disposal of Kendu leaves by the Government must also be in the public interest and not to serve the private interests of any person or class of persons. It is true that it is for the Government, having regard to all the circumstances, to act as a prudent businessman, and to sell or otherwise dispose of Kendu leaves purchased under the monopoly acquired u/s 3, but the profit resulting from the sale must be for the public benefit and not for private gain. Section 11 which provides that out of the net profits derived by the Government from the trade in Kendu leaves, an amount not less than one half is to be paid to the Samitis and Grama Panchayats emphasises the concept that the machinery of sale or disposal of Kendu leaves must also be geared to serve the public interest. If the scheme of disposal creates a class of middlemen who would purchase from the Government Kendu leaves at concessional rates and would earn large profits disproportionate to the nature of the service rendered or duty performed by them, it cannot claim the protection of Article 19 (6) (ii). Section 10 leaves the method of sale or disposal

or Kendu leaves to the Government as they think fit. The action of the Government if conceived and executed in the interest of the general public is not open to judicial scrutiny. But, it is not given to the Government thereby to create a monopoly in favour of third parties from their own monopoly.

59. The next decision referred to was Municipal Committee, Amritsar and Others Vs. State of Punjab and Others, which related to the validity of the Punjab Cattle Fairs (Regulation) Act (VI of 1968) and the attack was that the provision there violated Articles 13, 14, 19 and 31. Shah, J., as he then was, observed at page 1104, para. 10 as follows : -

A law which vests in the State a monopoly to carry on a certain trade or business, to the extent that it has direct relation to the creation of the monopoly, is not open to challenge on the ground of violation of the freedom guaranteed by Article 19(1)(g).

The learned Judge after referring to the passage at 1054 in Akadasi Padhan Vs. State of Orissa, , further observed that the provisions of the Act which seek to monopolise for the State the right to carry on cattle fairs are protected against the challenge that they put an unreasonable restriction upon persons carrying on the occupation of holding cattle fairs, that what is implicit in the grant of a monopoly to the State is expressly enacted in Section 3 (2) that no other person or authority may conduct a cattle fair at any place in the State of Punjab and that the restriction operates only in respect of cattle fairs and not other trades or occupations relating to dealing in cattle. Again, at page 1.105, in paragraph 11 the learned Judge further observed as follows:

It is implicit in the provisions of Sections 3 and 4 of the Act that the monopoly acquired by the State to hold and manage cattle fairs may be held on property belonging to the State and does not extend to the property of local authorities or private owners.

It was further observed that by imposing restrictions upon the right to hold a fair, the citizens are not deprived of their property, and the freedom guaranteed by Article 19 (1) (f) is not infringed. In paragraph 20 the learned Judge observed that section. 23 of the Act which gives provisions of the Act a paramount operation, notwithstanding anything inconsistent therewith contained in any other law for the time being in force will not supersede a constitutional guarantee.

60. In Virajlal Manilal and Co. and Others Vs. State of Madhya Pradesh and Others, the constitutional validity of section. 5 of the Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamawali (1965) Rules 4 to 9 came up for consideration, and Shelat, J., as he then was, observed at page 135, para. 10 as follows : -

The long title of the Act recites that the Act was enacted for regulating " the trade in Tendu leaves" by creating a State monopoly in such trade. Trade in Tendu leaves would consist of dealing in those leaves, i.e., their purchase, and

also transport of the leaves once purchased or sold would not prima facie be an organic or integral part of dealing in these leaves. It is something extraneous to dealing in these leaves something which takes place after the purchase of the sale thereof is completed and property in them has passed from the dealer to the purchaser, and therefore, does not form part of the trade in that commodity. That being so, the restrictions on their transport contained in section, 5 cannot be held to be the integral part of the trade monopoly, but as ancillary or incidental thereof, made for its effective enforcement. If that be so, it affects the right of the purchaser under Article 19 (1) (f) to hold and to dispose of the goods he has acquired - a right which is not correlated, as the right under Clause (g), is, with the monopoly which the section seeks to create. If follows, therefore, that such a provision would have to pass the test of reasonableness under Clause (5) and the first part of Clause (6) of Article 19. That would also be the position in respect of Article 304 (b). But, since the requirement of these provisions is the same the yardstick of reasonableness would be common to all these cases. It is well recognised that when an enactment is found to infringe any of the fundamental rights guaranteed under Article 19 (1), it must be held to be invalid unless those who support it can bring it under the protective provisions of Clause (5) or Clause (6) of that Article. To do so, the burden is on those who seek that protection and not on the citizen to show that the restrictive enactment is invalid.

At page 136, in para. 12 the learned Judge observed as follows : -

In our view, a permit system which regulates the movement of leaves purchased by a manufacturer of bidis from the unit where they are purchased to his warehouse, then to the branches and to the sattedars cannot upto that stage be regarded as unreasonable in the light of the object of the Act, the economic conditions prevailing in the State and the mischief which it seeks to cure.

In *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, , Shah, J., as he then was, at page 599, para. 70 observed as follows:

In dealing with the validity of a law : creating a State monopoly in *Akadasi Padhan Vs. State of Orissa*, , this Court unanimously held, that the validity of a law creating a State monopoly which " indirectly impinges on any other right" cannot be challenged on the ground that it imposes restrictions which are not reasonable restrictions in the interests of the general public. But if the law contains other incidental provisions which do not constitute an essential and integral part of the monopoly created by it, the validity of these provisions is liable to be tested under the first part of Article 19 (6). If they directly impair any other fundamental right guaranteed by Article 19 (6), the validity of those provisions will be tested by reference to the corresponding clauses of Article 19.

The Court also observed that the essential attribute of the law creating a monopoly will vary with the nature of the trade or business in which the monopoly is created. They will depend upon the nature of the commodity, the nature of trade in which it is involved and other circumstances. In *Akadasi Padhan Vs.*

State of Orissa, Gajendragadkar, J., speaking for the Court observed:

A law relating to a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only these essential and basic provisions which are protected by the latter part Of Article 19 (6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the first part of Article 19 (6).

He also observed at page 705

... the amendment (First Amendment) clearly indicates that State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of general public", so far as Article 19(1)(g) is concerned. This was reiterated in *Rashbihari Panda etc. Vs. State of Orissa*, , *Virajlal Manilal and Co. and Others Vs. State of Madhya Pradesh and Others*, , and *Municipal Committee, Amritsar and Others Vs. State of Punjab and Others*, , The cases dealt with the validity of laws creating State monopolies in the State. Clause (6) is however not restricted to a law creating State monopolies, and the rule enunciated in *Akadesi Padhan's case* (1963) 2 S.C.R. (Supp.) 691 : (1964) 2 S.C.J. 37 : AIR 1963 S.C. 1047 applies to all laws relating to the carrying on by the State of any trade, business, industry or service. By Article 298 the State is authorised to carry on trade which is competitive, or excludes the citizens from that trade completely or partially from carrying on that trade, or the trade is competitive. Imposition of restrictions which are incidental or subsidiary to the carrying on of trade by the State whether to the exclusion of the citizens or not, must, however, satisfy the test of the main limb.

It is thus seen that the law creating the State monopoly as such does not violate Article 19 (1) (g) because it leaves untouched the right of the citizen, who had hitherto been carrying on his business, to carry on his business in other spheres and the activities of such a citizen are not thereby killed. But in this case when the motor vehicle with which the citizen carries on his business, namely, plying for gain, is itself taken away along with the equipment, spares, tools and also the workshop, leaving no traces of the business which hitherto he had been carrying on, his right to carry on his business is infringed and the legislation which throws him out of the business cannot be protected under Article 19 (6) of the Constitution of India. Further the provisions in the impugned Ordinance relating to the interregnum period contained in Clauses 14 to 17 affect the petitioner's right to transfer the vehicle or deal with it in any manner he likes on notification and the requirement that the vehicle should be sold only to the Government and none else at a price in accordance with the schedule to the Act, all these, in our

opinion, result in the imposition of unreasonable restrictions on the permit-holder's right to carry on business and cannot be protected under Article 19 (6) of the Constitution.

61. We shall next consider the attack on the impugned enactment under Article 31. Article 298 confers power on the Executive of the Union and of each State to the carrying on of any trade or business and to the acquisition, holding and disposal of property. The present Article 298 replaced the original Article 298 by the Constitution (Seventh Amendment) Act, 1956. The amendment came into force on 1st November, 1956. The object of the amendment is stated as follows :

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To make it clear that the Union Government as well as the State Governments, are competent to carry on any commercial or industrial undertaking whether or not it is related to a matter within the legislative competence of the Union, or, as the case may be, of the State. Similarly, the holding, acquisition and disposal of property and the making of contracts by the Union or a State could be for any purpose without constitutional impropriety. At the same time, the revised Article, provides that this extension of the executive power of the Union, and of the State will be subject, in the former case, to legislation by the State and in the latter case, to legislation by Parliament.

In Halsbuiy's Laws of England, Third Edition, Volume 7, at page 192, para. 409, the executive power is denned as follows : -

409. The Executive : Although the legislative, executive, and judicial powers are formally distinct, it is not the case that legislative functions are exclusively performed by the Legislature, executive functions by the executive, or judicial functions by the judiciary. Executive functions are incapable of comprehensive definition, for they are merely the residue of the functions of Government after legislative and judicial functions have been taken away. They include in addition to the execution of the laws, the maintenance of public order, the management of Grown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations, and the provision or supervision of such services as education, public health, transport, and State assistance and insurance. In the performance of these functions, public authorities are bound to issue orders which are not for removed from legislations and to make decisions affecting the personal and proprietary rights of individuals which, while not strictly judicial, are quasi-judicial in character. Discretionary action of both these types must not be considered normal on the part of the executive.

In addition to these quasi-legislative and quasi-judicial functions, the Executive has also been empowered by the State to exercise functions which are strictly legislative and strictly judicial in character; and in certain instances, powers are exercised which appear to partake at the same moment of legislative, executive, and judicial characteristics. In view of the complexity of modern Government and

the congestion of Parliamentary business, it is probably necessary that the Executive should exercise powers of subordinate legislation. Whether it should exercise purely judicial powers is more open to question.

The power to carry on trade or business is expressly declared as included "in executive" power. Questions have arisen as to whether the Government's trading activities authorised under its executive power should be regarded as a commercial or a Governmental function. The only object of Article 298, as extracted above, makes it clear that no legislative authority is required merely to enable the Government to carry on any trade or business ; it does not intend to change the nature of the business and convert it into a Governmental function. The question whether Government would make a profit or not is irrelevant because it has been established that there is nothing to prevent the Government to enter into a trade as a competitor against private traders with the motive of earning profit. The question, therefore for consideration would be whether such function of a State Government can be treated as a Governmental function, for the purposes of Article 289 (3) of the Constitution, in the absence of a declaration of Parliament to that effect.

62. The acquisition, holding and disposal of property under Article 298 is the same as the acquisition, holding and disposal of property under Article 19 (.1) of the Constitution. The provisions establishing Corporations or Companies have nothing to do with compulsory acquisition.

63. As regards the question whether compulsory acquisition, or requisition falling under Article 31 (2) and acquisition and requisition of property occurring in List III, Entry 42 of the Seventh Schedule should be for a "public purpose" has been considered in India only in relation to land acquisition. It is contended that for trading purposes there cannot be compulsory acquisition. This is no doubt true and we will discuss this aspect a little later. In the land acquisition cases the question of public purpose now stands as follows : -

The expression "public purpose" is not capable of a precise definition and has no rigid meaning. The definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs.

In *The State of Bihar Vs. Sir Kameshwar Singh*, , it is stated that the point to be determined in each case is whether the acquisition is in the general interests of the community as distinguished from the private interests of an individual. Whatever furthers the general interests of the community as opposed to the particular interests of the individual must be regarded as a " public purpose and the expression has to be construed according to the spirit of the times in which the particular legislation is enacted. In determining whether a purpose is a public purpose, not only the present demands of the public, but also the future demands as may be fairly anticipated, should be taken into consideration. With the onward march of civilisation our notions as to the scope of the general

interests of the community are fast changing and widening with the result that our old and narrower notions as to the sanctity of private interests of the individual can no longer stem the forward flowing tide of time, and must necessarily give way to the broader notions of the general interests of the community. In *Somawanti v. State of Punjab* (1963) 2 S.C.J. 35 : 1963 S.C 151 Mudholkar, J. delivering the judgment on behalf of the Bench observed at page 163 that public purpose is bound to vary with the times and the prevailing conditions in a given locality, and therefore it would not be a practical proposition" even to attempt a comprehensive definition of it. It is because of this that the Legislature has left it to the Government to say what is a public purpose and also to declare the need of a given land for a public purpose. In *Nicholas on " Eminent Domain"* Volume II, page 847, it is stated that if the use for which the land is taken by eminent domain is public, the taking is not invalid merely because an incidental benefit will enure to private individuals. In *Belegal Gundachar and Another Vs. The State of Madras and Others*, , Rajamannar, C. J., and Venkatarama Ayyar, J., held that the acquisition for digging of an irrigation channel which benefits a single individual is nevertheless a public purpose for which the land could be acquired. In *Babu Barkya Thakur Vs. The State of Bombay and Others*, , it was stated that it is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in the improvement, provided, the object of acquisition advances a public purpose. In *Arora v. State of Uttar Pradesh and Ors.* 1964 S.C. 1230 : (1964)2 S.C.J. 652, relating to land required for a company for the construction of textile machinery parts factory by Lakshmi Ratan Engineering Works Limited, Kanpur, Wanchoo, J., as he then was, observed at page 1240 as follows:

Then it is urged that the acquisition in the present case cannot be said to be for a public purpose inasmuch as the agreement between the company and the Government does not regulate or control the products of the company in the interests of the public. We do not think it is the purpose of the Act that the agreement should provide for regulation or control of the products of a company, which probably means that Government should control the quantum of production and distribution or the price of the produced articles. This, in our opinion, is foreign to the purpose of the Act. All that the Act requires is that before land is transferred to the company by the Government, the agreement should provide that land would be used for purpose for which it was acquired and for no other. The Act has nothing to do with the control or regulation of the products of the company and gives no power to Government in that behalf.

In *R.K. Agarwalla and Others Vs. State of West Bengal and Others*, , Shah, J., as he then was., observed at page 1008 as follows:

Acquisition of the appellant's land was undoubtedly for construction of building or work for the Sangha, and the Sangha is engaging itself in work, which is for a public purpose.

64. Mr. Chari next contended that whatever else may come under public purpose

authorising acquisition, a trading corporation or a State Trade Organisation, even if a wholly owned Government Company, cannot be authorised to get its plant and machinery or stock-in-trade by compulsory acquisition any more than any other limited company or partnership or individual can be so authorised. He further contended that in trading the State is in the same position as a private individual except for the one factor of obtaining partial or complete monopoly bylaw according to Article 19 (Jo) ; otherwise, the Government could acquire compulsorily the stock-in-trade of any company doing business at a lesser price and sell the same at a higher price.

65. In *Cooper v. Union of India* 1970 S.C. 564 : (1970) 1 S.C.J. 564, Shah, J., observed that if there is no public purpose to sustain compulsory acquisition the law violates Article 31 (2). If the acquisition is for a public purpose, substantive reasonableness of the restrictions which includes deprivation may unless otherwise established, be presumed.

66. In *the State of Maharashtra v. Himmatbhai Narbheram Rao and Ors.* 1970 S.C. 1157 : (1970) 1 S.C.J. 685, the Supreme Court considered the validity of Section 385 of the Bombay Municipal Corporation Act III of 1888. Shah, J. while holding that the restrictions imposed by the impugned law upon the right of the owner, however would satisfy for the reasons already stated, the test of reasonableness under Article 19(5), and he observed at page 1165 as follows : -?

The question still remains whether the impugned law is void because it does not provide for payment of compensation for the loss occasioned to the owner of the carcass resulting from the extinction of his title thereto. Since the Amendment by the Constitution (Fourth Amendment) Act, 1955, Clause's (2) and (2-A) of Article 31 deals with the acquisition or requisitioning of property movable or immovable, for a public purpose. The acquisition or requisitioning of the property for a public purpose, i.e., for using the property for some purpose which would be beneficial to the public. The right guaranteed by Article 31(2) is that property shall not be compulsorily acquired or requisitioned for a public, purpose save by authority of law which provides for compensation for the property so acquired or requisitioned. The expression " acquired or requisitioned for a public purpose", means acquired or requisitioned for being appropriated to or used for a public purpose. But, the law which provides for extinction of the ownership and creation of an interest in the Corporation for the purpose of disposal of the carcass is not a law for acquisition of property for a public purpose; its primary purpose is of destruction of the carcass in the public interest and not utilisation of the property for a public purpose. The case would not, therefore, fall within the terms of Article 31 (2).

67. Our attention was next drawn to Clause 4 (3) of the Ordinance which runs as follows : -

The stage carriages or contract carriages and other property vesting in the Government under sub-section* (!) and Sub-section (2) shall with effect on and

from the notified date, he deemed to have been acquired for a public purpose.

Mr. V.K.T. Chari contended that there can be no acquisition under a "deeming" provision. His contention is that normally in a Land Acquisition Notification what the public purpose is will be stated in the Notification itself. The existence of a public purpose being a precondition for an Acquisition Law under Schedule 7, List 3, Entry 42, it is not open to the Legislature to create a fiction as to a public purpose, and consequently, the deeming provision that an acquisition is deemed to be for a public purpose cannot be presumed. In that view, the learned Counsel contends that clause 4 (3) is invalid. We have referred to earlier what exactly is the meaning of a "deeming provision" and the case law on the point. It is unnecessary to refer to them again. We are in agreement with the contention of the learned Counsel.

68. The learned Advocate-General who contended that the acquisition in this case is for public purpose referred to *Hamubai Pramjee Patit v. Secretary of State for India* in Council ILR 39 Bom. 279, where the Privy Council referred to the definition of a "public purpose" and approved the extract of the judgment of Batchelor, J. in the judgment under appeal and their Lordship; extracted the said observations:

General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase "public purposes" in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals is directed and vitally concerned."

The learned Advocate-General then referred to some passages in *The State of Bihar Vs. Sir Kameshwar Singh*, in support of his contention. The passages are in paras. 104, 105 and 106, where Das, J, after referring to the passages from Willis, on Constitutional Law, Cooley's on Constitutional Limitations and corpus juris which we shall deal with later, as also the view of Batchelor, J., referred to the above and observed as follows at page 290, para. 106:

From what I have stated so far, it follows that whatever furthers the general interest of the community as opposed to the particular interests of the individual must be regarded as a public purpose. With the onward march of civilisation our notions as to the scope of the general interests of the community are fast changing and widening with the result that our old and narrower notions as to the sanctity of the private interests of the individual can no longer stem the forward flowing tide of time and must necessarily give way to the broader notions of the general interests of the community. The emphasis is unmistakably shifting from the individual to the community. This modern trend in the social and political philosophy is well reflected and given expression to in our Constitution.

The learned Advocate General placed considerable reliance upon the

observations of one of us in W.P. No. 784 of 1962, etc., batch. The following passage in the said judgment was relied upon:

It was contended that in determining the ambit for this purpose, the more modern view of the American decisions rendered on the Fifth Amendment of the American Constitution that private property shall not be taken for public use without just compensation, should be kept in view, the modern view being that public use is not to be confined to public enjoyment or actual use by the public, but should be understood as public advantage, convenience or benefit to the public at large or an appreciable section of the public. Dealing with this contention the Supreme Court observed at page 772 as follows:

But we do not think it necessary to examine the American cases, cited before us, because the words in our statute are not in *pari materia* with the words used in the Fifth Amendment to the American Constitution. Now, so far as the words in the Act are concerned, it is to our mind perfectly obvious that it is the actual use of the work which the Act envisages and not the public benefit that might directly or indirectly arise from the use of the land acquired. This is clear from the words used both in Section 40(1)(b) and the fifth term of the agreement provided in Section 41....These words, therefore, in the Act are clearly referable to the narrower view prevalent in America, which emphasises the use by the public of the actual work constructed. We are therefore of the opinion that the respondents can derive no advantage from the American cases cited on their behalf to show the wider interpretation of the words used in the Fifth Amendment to the American Constitution.

69. It is therefore, obvious that the decision of the Supreme Court was not on the question whether public purpose in Part II of the Land Acquisition Act should or should not be understood in the light of the modern view that public purpose includes a purpose who is beneficial to the community at large or a considerable section, thereof. In fact in *Smt. Somawanti and Ors. v. The State of Punjab and Gujarat* Petitions Nos. 246 to 248 the Supreme Court referred to the old and the modern views on the concept of public use or public purpose and ruled that the modern view should govern and pointed out : "'Public purpose" as explained by this Court in *Babu Barkaya Tkakur's* case (1961) 2 S.C.J. 392 : AIR 1960 S.C. 1203, means a purpose which is beneficial to the community.

70. His next contention is that the nationalisation of public utility would fall under the law of Eminent Domain and in this context he referred to *Nichols on Eminent Domain*, Volume 2, III Edition, page 499. It is stated therein that Eminent Domain may be employed in aid of public travel by water as unquestionably as in the case of travel by land, and he sought to support the validity of the impugned Ordinance on the ground of the law of Eminent Domain.

71. The learned Advocate-General next referred to the various provisions of the impugned enactment and contended that the operators and persons interested are defined in the impugned Ordinance and all rights are worked out on the basis

of vesting of the buses on the notified date, similar to the provisions contained in the Zamindari Abolition Act. In the Zamindari Abolition Act, there is no question of any estate having been purchased under the hire-purchase agreement as already stated and, therefore, the concept of the right of a financier under the hire-purchase agreement cannot be invoked in upholding the validity of the impugned Ordinance. In the event of our taking a contrary view on the applicability of Article 39 (6) and (c) the learned Advocate-General sought to uphold the enactment by contending that the acquisition under the Ordinance is for a public purpose and the acquisition being in the interests of the public, the impugned [Ordinance could be saved either under Article 19 (6) or Article 3.1 (2) of the Constitution. The learned Advocate-General in seeking to equate " public purpose" with the interest of the public, referred to Dosa Satyanarayanamurthy etc. Vs. The Andhra Pradesh State Road Transport Corporation, Subba Rao, J., as he then was, at page 87 observed as follows : -

Ordinarily, a State Transport Undertaking, compared with persons or private undertakings, should be in a better position than others to carry on the said services for the benefit of the public; administratively, financially and technically it can be expected to be in a far better position than others. It can provide more well-equipped buses, give better amenities to the travelling public, keep regular timings, repair or replace the buses in emergencies. It may also employ efficient supervisory staff to keep things going at an appreciably high standard.

We shall revert to this question as to how far public purpose could be equated to "the interests of the public", again after briefly referring to some standard books among others.

72. The learned Advocate-General referred to some of the provisions of the Air Corporation Act (XXVII of 1953), particularly Sections 16, 17 and 35 in support of his contention that there are similar provisions in respect of undertakings of existing air companies. for vesting the same in a corporation, effecting such vesting and for the payment of compensation for such compulsory acquisition of the undertaking. In our view, complications created by purchases under the hire-purchase agreements were not present in those enactments, and therefore, the analogy of the provisions of the Air Corporation Act has nothing to do with the impugned Ordinance.

73. The learned Advocate-General next referred to Willis on Constitutional Law, page 817. The passage relied upon runs as follows : -

In order to have an exercise of the power of Eminent Domain, private property must be taken for a public use. What is a public use? On this question there have been two view points. One may be called the older view point and the other the newer view point. According to the older view point, in order to have a public use, there must be a use by the public....According to the newer view point, there is a public use if the thing taken is useful to the public. This makes public use for Eminent Domain practically synonymous with public purpose for taxation

and somewhat like social interest for police power.

The learned Advocate-General next referred to Cooley's Constitutional Limitations, Vol. II, pages 1139-40. The passage runs as follows:

No satisfactory definition of the terms public use has ever been achieved by the Courts. Two different theories are presented by the judicial attempts to describe the subject to which the expression would apply. One theory of public use limits the application to "employment" - "occupation". The more liberal and more flexible meaning makes it synonymous with "public-advantages", public benefit. A little investigation will show that any definition attempted would exclude some subjects - that properly should be included in - and include some subjects that must be excluded from the operation of the words "public use". As might be expected, the more limited application of the principle appears in the earlier cases and the more liberal application has been rendered necessary by complex condition due to recent developments of civilisation and the increasing density of population. In the very nature of the case, modern conditions and the increasing inter-dependence of the different human factors in the progressive complexity of a community, make it necessary for the Government to touch upon and limit individual activities at more points than formerly.

The next reference by the learned Advocate-General was to Vol. 20 of Corpus Juris, Article 30 at pages 552 and 553 under the caption "what is a public use?". The passage runs as follows:

No general definition, of what degree of public good will meet the constitutional requirements for a "public use" can be framed, as it is, in every case, a question of public policy. The meaning of the term is flexible and is not confined to what may constitute a public use at any given time, but in general it may be said to cover a use affecting the public generally, or any number thereof, as distinguished from particular individuals. Some Courts have gone so far in the direction of a liberal construction as to hold that public use is synonymous with "public benefit", "public utility" or "public advantage" and to authorise the exercise of the power of Eminent Domain to promote such public benefit, etc., specifically where the interests involved are of considerable magnitude, and it is sought to use the power in order that the natural resources and advantages of a locality may receive the fullest development in view of the general welfare.

74. In our opinion, the words "public purpose" cannot be equated to "interest, of the public". If land is acquired under the Land Acquisition Act for a stated purpose, just compensation is payable for the property acquired in terms of the Land Acquisition Act. But, if property is acquired for the purpose falling under Article 39 it is sufficient if the principles of compensation are set out, and the justness of the compensation is not for the Court. In this case, we have held that the acquisition does not fall under Article 39 (b) or (c). Even the framers of the Ordinance realised that the acquisition is not for a public purpose, by their using the words that the acquisition must be, deemed to be for a public purpose.

Further, the property acquired is not land, but movable property which can be purchased in the open market and when such property, which is available for sale in the open market, is sought to be acquired, in our opinion, the market price of such property (vehicle) acquired should be paid in order to acquire the same. Clause 6 of the Ordinance and the provisions of the First Schedule taken along with other provisions in the impugned Ordinance do not show that the market value is calculated for the property sought to be acquired.

75. We are, therefore, of opinion that under the impugned Ordinance there is no " public purpose " to sustain compulsory acquisition, and therefore Article 31 (2) is violated.

76. Mr. Chari then developed this point from a different angle. He referred to Article 300 and drew a distinction between the sovereign and commercial functions of the Government. The distinction was present even long before 1858. It is unnecessary to set out the constitutional provisions in any great detail. In 1765, the East India Company obtained a " Diwani" from the Moghul Emperor and from that time upto 1858, the company had a dual character, namely, that of a trader as well as of a sovereign, inasmuch as it obtained fiscal and general administration of the country from the Crown. In 1858, the Crown assumed sovereignty over India and took over the administration of India from the hands of the East India Company. Cases commencing from *Peninsular and Oriental Steam Navigation Company v. Secretary of State* (1861) 5 Bom.H.C.R. Appendix A. have considered these dual functions of the Government. In *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, relating to the State's vicarious liability for tortious acts committed by Government servants, *Sinha, C.J.*, traced the history of Article 300 and the decision in the *P. & O.* case referred to above, and the subsequent decision on the point, and held at page 940 as follows : -

The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own Courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India. Now that we have, by our Constitution established a Republican form of Government, and one of the objectives is to establish a socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification in principle or in public interest, that the State should not be held liable vicariously for the tortious act of its servant.

In *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, *Gajendragadkar, C.J.*, observed at page 1046 as follows:

Thus it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are referable

to the exercise of sovereign, powers delegated to public servants, and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant, and it gives rise to a claim for damages, the question to ask is : was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on the delegation of the sovereign powers of the State to such public servant ? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand if the tortious act has been committed by. a public servant in discharge of duties assigned of any sovereign power, an action for damages would lie.

Again in para. 28 at page 1048, the Chief Justice observed as follows:

It is not difficult to realise the significance and importance of making such a distinction particularly at the present time when, in pursuit of their welfare ideal, the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of Governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed by Government employees in, relation to other activities which may be conveniently described as non-Governmental or non-sovereign citizens who have a cause of action for damages should not be precluded from making their claim against the State. That is the basis on which the area of the State immunity against such claims must be limited ; and this is exactly what has been done by this Court in its decision in the case of State of Rajasthan (1963) 1 S.C.J. 307 : AIR 1962 S.C. 933.

In State of Madras represented by the State of Madras Vs. Employees State Insurance Corporation, Madras, , Kailasam, J. observed in para. 11, page 384 as follows:

Admittedly, the established rights of the Crown are not affected by holding the Government Transport, which is running a business liable to indemnify the Employees" State Insurance Corporation. So also, the Act cannot be attacked on the ground that it was not made for the preservation of public rights and it would be absurd to exclude the State from the liability as the State is intended for public good. The Employees" State Insurance Act was passed for providing benefits to employees in case of sickness, maternity and employment injury and for making provisions for certain other matters. The State employing itself in the business of road transport, by virtue of Section 43 (4) of the Motor Vehicles Act, cannot be said to be discharging any functions of the State, and there is no reason why the State should not be made liable for an injury for which a third person carrying on the business of road transport would be liable.

In the Andhra Pradesh State Road Transport Corporation, by its Andhra Pradesh State Road Transport Corporation Vs. Income Tax Officer, B-I B-ward, Hyderabad,

and Another, in which the question of exemption from liability of the income of the Andhra Pradesh Road Transport Corporation established under the Act from Union taxation came up for consideration, At page 1498, para. 21, Gajendragadkar, C.J., who delivered the judgment on behalf of the Bench, observed as follows:

There is no doubt that the bulk of the capital is contributed by the State Government and a small proportion by the Central Government, and in that sense, the majority of shares, are at present owned by the State Government. There is also no doubt that the Corporation is a State-controlled Corporation in the same sense that at all material stages and in all material particulars, the activity of the Corporation is controlled by the State; but, it is clear that all other citizens may be admitted to the group of shareholders, and from that point of view, the Act contemplates contribution of the capital for the Corporation not only by the Central and the State Governments, but also by the citizens. The main point which we are examining at this stage is : is the income derived by the appellant from its trading activity, income of the State under Article 289 (1) ? In our opinion, the answer to this question must be in the negative. Far from making any provision which would make the income that of the State, all the relevant provisions emphatically bring out the separate personality of the Corporation and proceed on the basis that the trading activity is run by the Corporation and the profit and loss that would be made as a result of the trading activity would be the profit and loss of the Corporation. There is no provision in the Act which has attempted to lift the veil from the face of the Corporation and thereby enable the shareholders to claim that despite the form which the organisation has taken, it is the shareholders who run the trade and who can claim the income coming from it as their own.

77. It is thus clear that the distinction between the trading activity of the Government and the Sovereign functions of the Government has been maintained. In *Doraiswami Goundar v. The State of Madras*, by the District Collector, North Arcot at Vellore S.A. No. 77 of 1967 (unreported), we had occasion to consider the above decisions in a suit filed for damages for malicious prosecution against the State and the liability of the State therefor. We followed the decision in *A.L.V.R.S.T. Veerappa Chettiar Vs. S. Michael etc.*, and held that the proper test in such cases is whether such a suit, if laid before 1858, against the East India Company would have been maintainable and that if the answer is " yes ", the suit will lie.

78. We are of opinion that the acquisition in the present case being to enable the Government to carry on the trade of running buses and such business not being for a Government purpose, the acquisition is not for a public purpose and the restrictions on the carrying on of a business imposed on the petitioners cannot be said to be reasonable. While Chapter IV-A of the Motor Vehicles Act in so far as it allows the Government or any Corporation created by them to carry on trade and allows the permits to lapse on the expiry of the period without granting

renewals leaving the vehicles intact with the owner, has been held to be reasonable, the impugned enactment, in so far as it seeks to acquire the vehicles themselves, cannot be upheld, as they are not reasonable restrictions imposed in the interests of the general public. We have earlier dealt with the question as to how the various provisions in the impugned Ordinance are unreasonable when dealing with each of the provisions of the impugned Ordinance.

79. Mr. V.K.T. Chari then contended that the cases arising under the Land Acquisition Act and relating to the abolition of Zamindaries, all of which relate to land, cannot afford any basis to the acquisition of movable property like motor vehicles. The contention is that immovable property is limited geographically, while movable property is available in the market for purchase, and therefore, compulsory acquisition of movable property cannot be resorted to in acquiring such property. The learned Counsel further referred to the provisions of the Essential Commodities Act, 1955 and the Industrial Development Act and Regulation, 1951, and contended that fixation of price was permitted under the various enactments and that after the 25th Amendment, this question has assumed very great importance.

80. In *Rajahmundry Electric Supply Corporation, Ltd. v. The State of Andhra Pradesh* 1954 S.C.J. 320 : 1954 S.C.R. 779 : A.I.R 54 S.C. 251 the question which arose was as to the validity of an order in writing, dated 2nd September, 1950, made by the Government of Madras declaring that the undertaking of the appellant company should vest in the Government on a specified date under the Madras Electricity Supply Undertakings (Acquisition) Act (XLIII of 1949). The validity of that order was questioned. It was contended that the Act was beyond the legislative competence of the Madras Legislature. The High Court rejected the petitioner's contention and held that the law was, in pith and substance, a law with respect to electricity and was, therefore, within the legislative competency of the Provincial Legislature. The contention before the Supreme Court was that the Act was ultra vires, because the acquisition of the electrical undertaking was not a legislative item in any of the three Lists in the Seventh Schedule to the Government of India Act, 1935. The Supreme Court upheld the contention, and Das, J. who delivered the judgment on behalf of the Bench observed as follows at page 253:

It is, therefore, clear that although Parliament expressly entrusted the Provincial Legislature with power to make a law with respect to compulsory acquisition of land, it did not straightaway grant any power, either to the Federal Legislature or the Provincial Legislature, to make a law with respect to compulsory acquisition of a commercial or industrial undertaking, but left it to the discretion of the Governor-General to empower either of the Legislatures to enact such a law. There is no suggestion that the Governor-General, had, in exercise of his discretionary powers u/s 104, authorised the Madras Legislature to enact the impugned Act and, therefore, the Act was prima facie, beyond the legislative competency of the Madras Legislature.

81. In *West Ramnad Electric Distribution Co. Ltd. Vs. State of Madras*, the validity of the Madras Electricity Supply Undertakings (Acquisition) Act (XXIX of 1954) and the notification issued thereunder came up for consideration and the attack was regarding the vires of the acts done under the earlier Act of 1949 under the saving provision. Gajendragadkar, J. as he then was, who delivered the judgment on behalf of the Bench, upheld the validity of the Act and the notification issued under the prior Act.

82. Mr. Chari in dealing with the provisions dealing with compulsory sales to the Government referred to a series of decisions wherein the validity of compulsory contracts as contravening Article 19 (1) (f) and (g) came up for consideration and his contention was that such sales were in effect no sales at all.

83. In *Bhaiya Punjalal Bhagwanddin Vs. Dave Bhagwatprasad Prabhuprasad, , Shah, J.* as he then was, expressing the majority view stated that the requirements for entering into a valid sale were not present in the case in question when no offer to purchase sugar and no acceptance of any offer by the manufacturer, that the manufacturer was, under the Control Order, left with no volition, that he could not decline to carry out the Order, that if he did so, he was liable to be punished for breach of the Order and his goods were liable to be forfeited and that, therefore, no sale was concluded. A similar question came to be considered in *Kirkness v. John Hudson and Co., Ltd. (1955) 2 All E.R. 345* wherein Viscount Simonds observed at page 349 as follows : -

There are aspects of a so called compulsory sale which clearly distinguish it from a sale *stricto sensu*, and I am not satisfied that without some context to aid it the word "sale" in an Act of Parliament should be held to include a transaction which is more accurately, and, I think now, more commonly, described as a compulsory acquisition. But, however, this may be, the operation of the Transport Act, 1947, is widely different from that of the Acts to which I have referred. It has not those elements which, in some degree, assimilate a compulsory sale to a sale *simpliciter*, and make the name, if a misnomer, at least a convenient misnomer. It was easy to describe it as a purchase or sale with the qualifying adjective "compulsory", a transaction in which the parties were placed in a position to negotiate, and, apart from the power of compulsion in the background, were not unlike an ordinary vendor and purchaser. These elements, as I say, are wholly lacking in the transaction under view, and it is, in my opinion, an illegitimate use of language to say that, because an acquisition under the procedure of the Lands Clauses Acts is spoken of as a compulsory sale, therefore this transaction is a sale.

In *Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others, ,* relating to the validity of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, (XIV of 1961), Bachawat, J., who delivered the judgment on behalf of the Bench distinguished *Kirkness v. John Hudson & C. Ltd. (1955)2 All E.R. 345* and held that a valid contract was formed between the parties and that the State legislature was competent to tax the purchases made

under such a contract. The above decisions relate to compulsory contracts entered into between the parties. We are of opinion that there is considerable force, in the contention of the learned Counsel.

84. The next ground of attack by Mr. Chari is that the provisions of the Ordinance are hit at by Article 14. The contention is that in respect of a matter falling under the Concurrent List. (List III of Seventh Schedule), the State has now made a law on a matter where the Centre has already made a law, and that the State Law in providing various restrictions is discriminatory. According to him, the test to be applied in such cases is whether the impugned State Law, if it had been made by the Centre for the purposes of the State, would be discriminatory. In other words, the contention is that there is discriminatory legislation between bus operators operating in the particular State where such legislation is sought to be introduced and operators outside that State and consequently, Article 14 is infringed. There is considerable force in this contention. Obviously, if such law is made by the Centre, the restrictions imposed by such law on bus operators in the State to which the law purports to apply will be discriminatory. The learned Advocate-General sought to meet this point by contending that bus operators in Tamil Nadu are a class by themselves, and there is no discrimination? among the bus operators in Tamil Nadu and that consequently, there is no discrimination. We are unable to agree with the contention of the learned Advocate-General and we are of opinion that Article 14 is contravened.

85. The learned Advocate-General further contended that every law is subject to Article 13 and in dealing with the validity of a law as contravening Article 14, he referred to two decisions one in the *The State of Madhya Pradesh Vs. G.C. Mandawar*, and the other in *Purshottam Govindji Halai Vs. Shree B.M. Desai, Additional Collector of Bombay and Others*, dealing with the question whether the scale of dearness allowance recommended by the Central Pay Commission and sanctioned by the Central Government, being different from the dearness allowance sanctioned by the State Government, is hit at by Article 14. The Supreme Court held that the sources of authority for the two statutes being different, Article 14 can have no application. We are of opinion that the above decision is distinguishable. Similarly, in *Purshottam Govindji Halai Vs. Shree B.M. Desai, Additional Collector of Bombay and Others*, where different Land Revenue Recovery Acts were prevalent in different States, the provisions of the one being stricter than the provisions in the other, the question arose whether Article 14 is contravened and the Supreme Court repelled the contention. We are of opinion that this decision is also distinguishable from the facts of the present case. Further, we are of opinion that even regarding the choice as to, in which order, the Districts are to be notified, we do not find sufficient nexus between the districts where smaller number of motor vehicles are run and the object sought to be achieved under the Act. During the five year period, operators of one district are sought to be discriminated against operators in another district.

86. We shall next refer to the other contentions of the learned Advocate-General.

His contention is that road transport is a public utility concern similar to shipping, air transport, railway transport, electricity, etc. and except road transport, all other modes of transport have been nationalised. The learned Advocate-General referred to Halsbury's Laws of England, Volume 33, Third Edition, page 393, para. 658, which runs as follows : -

In 1947 the British Transport Commission was set up and charged with a general duty of providing, or securing or promoting the provision of, an efficient, adequate, economical and properly integrated system of public inland transport for passengers and goods. It was empowered to carry goods and passengers by road, and its many ancillary powers included that of acquiring by agreement any road transport undertaking and any securities of any body corporate carrying on or about to carry on a road transport undertaking.

His contention is that nationalisation is the order of the day, and he referred to the provisions of Chapter IV-A and the Madras enactments, viz., Madras Act XVI of 1971 providing a ceiling of 10 permits and Act XXXVII of 1971, dealing with the operators owning more than 50 permits, etc. The learned Advocate-General contended that the Tamil Nadu State is the first State in the country, where buses have been acquired and that the acquisition of buses is perfectly valid.

87. The learned Advocate-General next contended that the impugned Ordinance did not deal with ownership of property, and in that connection referred to Salmond on Jurisprudence, Twelfth Edition at page 412 in regard to the meaning of the term "property". The term "property" has several meanings. In its widest sense, -Property includes all a person's legal rights, of whatever description. In a second and narrower sense, Salmond says that property includes not all a person's rights but only his proprietary, as opposed to his personal rights. In a third application, it is stated that the term includes not even all proprietary rights, but only those which are both proprietary and in rent and finally, in the narrowest use of the term, it includes nothing more than corporeal property, that is to say, the right of ownership in a material object, or that object itself. The contention of the learned Advocate-General is that the word "property" should not always be confined as including all a person's legal rights, of whatever description and that it could be construed in a narrower sense, as pointed out by Salmond. We are unable to accept his contention, as the rights of the financier-owner are sought to be taken away without reference to the owner and the rights of the permit-holder unreasonably and not for a public purpose.

88. The learned Advocate-General next laid considerable stress on Article 358 of the Constitution and contended that while a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State to make any law or to take any executive action during the pendency of the proclamation of Emergency. This question has come up for consideration a number of times and the Supreme Court has refrained from expressing a final opinion on this question. In *Makhan Singh Vs. State of Punjab* (and connected appeals), , the difference between Article 358 and Article 359 was pointed out. The validity of

the Gujarat Agricultural Produce Markets Act, 1964, was sought to be sustained under Article 358, and their Lordships had not finally expressed any opinion on the question. A similar question, came up for consideration in the State of Maharashtra and Ors. v. Lok Chikshan Sanstha and Ors. AIR 1973 S.C. 558, and this question again was raised. Vaidialingam, J., observed at page 595 as follows:

Therefore, it will be seen that during the period when a Proclamation of Emergency is in operation, Article 19 will not operate as a bar in respect of any law or any executive action coming within the terms of Article 358. We will be showing in the latter part of the judgment that Clauses (1) and (2) of Rule 3 read with the various instructions issued by the State cannot be considered to be vague or ambiguous as erroneously held by the High Court. These instructions, in so far as they go, are perfectly valid, and the State Government was competent to issue these executive instructions for the guidance of the educational authorities dealing with applications for grant of permission to start schools. If so, it follows that the view of the High Court that Article 358 does not save Clauses (1) and (2) of Rule 3 is erroneous. In this view, Article 19 could not have been invoked by the writ-petitioners during the period when the Proclamation of Emergency was admittedly in operation. As Article 19 is thus out of the picture, the question whether Clauses (1) and (2) of Rule 3 imposed reasonable restrictions and are thus saved, does not arise for consideration.

In Raval and Co. Vs. K.G. Ramachandran and Others, which related to the constitutional validity of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), Anantanarayanan, Offg. C.J., delivering the judgment on behalf of the Full Bench referred to the judgment in Makhan Singh Vs. State of Punjab (and connected appeals), , and Jan Mohammad Noor Mohammad Begban Vs. State of Gujarat and Another, . The learned Judge referred to the passage in AIR 1966 S.C. 385 which ran as follows : -

... the President of India having declared in the month of December, 1962 a state of Emergency in exercise of the powers reserved under the Constitution the right to enforce the fundamental rights guaranteed under Article 19 of the Constitution remains suspended by virtue of Article 358 for the duration of the period of the Emergency.

There, the contention was that Article 358 will not preclude the landlord from seeking to establish that the impugned Act infringed Article 19 in certain respects and that it must be struck down to that extent. That contention was upheld.

89. The defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation, is Entry I, List I of the Seventh Schedule. In the Supreme Court decision referred to above, the Supreme Court went into the merits of the case and the scope of Article 358 was not finally decided. Article 358 proceeds on the principle that during an Emergency, the power of the State to control persons and property has to be greater than in

ordinary times. This consideration would apply only to : firstly Government control in the region of public law ; and secondly to legislation enacted by reason of the Emergency. The contention of Mr. Chari is that Emergency can have no impact on legislation as to matters of private law -example List II, Entry 18, List III, Entry 5, etc. On a construction of Article 358, it was contended that it would apply to a law occasioned by the particular Emergency referred to in the Proclamation under Article 352 and that a final acquisition like that provided in the impugned Ordinance would not fall within Article 358 at all.

90. Our attention was also drawn to the article written by Mr. V.K.T. Chari, on Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, , where the scope of Article 358 has been fully examined. We derived considerable assistance from the said article and in our view, the contention of Mr. Chari, has to be accepted. Whatever may be the position, we heard arguments on all the contentions put forward, and we have dealt with them on merits also.

91. Mr. K. Parasaran, the Standing Counsel for the Central Government who followed the learned Advocate-General incidentally contended that the provisions or the Ordinance really fall under Article 39 (b) and (c) of the Constitution. His contention was that the term " material resources" is of wider import than "natural resources" and therefore, the acquisition of motor vehicles is justified. But, the fallacy in the reasoning adopted by the learned Counsel is that such material resources must be owned by the community and in order to subserve the common good, such resources of the community have to be pooled and distributed. It cannot be said that the! motor vehicles running in the State belong to the community, and therefore the wider import that is sought to be, given by the learned Standing Counsel cannot be accepted.

92. The learned Counsel next referred to the question that the assent of the President having been given, it is not open to judicial review. The complaint of Mr. Chari, in this behalf was that the common counter-affidavit filed in the batch of writ petitions on behalf of the Central Government is very laconic, and the deponent of the affidavit, instead of stating as to what materials were placed before the President before obtaining the assent contented himself by stating that the required instructions were sought for and given properly and validly-

93. Mr. Chari referred to the allegations in the counter filed on behalf of the Union Government and contended that when a specific allegation is made of fraud and misrepresentation in securing the President's assent, the deponent of the affidavit, instead of specifically stating what materials were placed before the President for securing his assent, made a blanket statement without giving details and calling upon the petitioners to strictly prove the allegations. In our view, the counter-affidavit could have been more specific, especially as the President's assent not being a formality, as stated by us already, is required to be given after scrutiny of the provisions of the Ordinance sent to him with reference to the existing law and after satisfying himself as to the validity of the impugned provisions.

94. In our view, this question does not assume great prominence, as the impugned Ordinance has been replaced by the Act.

95. We heard the writ petitions and reserved the judgment on 6th March, 1973. Even during the hearing of the Writ Petitions, the Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Bill, 1973 was under discussion in the Legislature. Mr. V. K. T. Chari, appearing for the petitioners made a statement that in case judgment is not delivered before 14th March, 1973 on which date, the Ordinance will lapse and in case, the Ordinance is replaced by an enactment, his argument on the Ordinance may be treated as arguments questioning the enactment itself. He accordingly filed a petition seeking to amend the prayer in the writ petition already filed in the following terms:

The petitioner herein prays that this Hon'ble Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction, forbearing the State of Tamil Nadu from in any manner, applying or enforcing any of the provisions of the Tamil Nadu Ordinance of 1973 or the Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Act, 1973, that is to say, from enforcing Sections 14, 15, 16 and 17 of the said Ordinance or Act or issuing any Notification u/s 1(4)(b) or Section 4 etc.

We are ordering the applications filed in |each of the writ petitions.

96. We may observe that there is not any material difference between the impugned Act and the Ordinance, sought to be replaced. We may, however, point out that in a batch of writ petitions Raheem Roadways, Periyakulam v. R.T.A., Madurai W.P. Nos. 493 of 1973, 295 of 1973 etc. dated 8th February, 1973 decided by the Chief Justice and Raghavan, J., seeking to maintain the status quo filed by the State Carriage Operators permitting them to continue to operate on the routes on the temporary permits u/s 16 of the Ordinance, we considered the scope of Section 16, and observed as follows:

We have carefully considered the language employed by Section 16 independently of and in conjunction with the rest of the provisions of the Ordinance which we have noticed in the earlier part of this judgment. The opening words of Section 16 mean that, for the purpose of entitlement thereunder, neither the provisions in the Ordinance except Section 16 itself, nor the provisions in the Motor Vehicles Act, can be looked into. In considering" whether an operator will be entitled to a temporary permit under the Motor Vehicles Act, the Ordinance and the Motor Vehicles Act will have to be put aside. The right to a temporary permit, therefore, entirely arises in terms of Section 16. No doubt, Section 16 says that such temporary permit will be under the Motor Vehicles Act. This is what is strongly relied on by the learned Advocate-General. But, then, his argument overlooks the opening words of the section, namely, "notwithstanding anything contained in the Ordinance or in the Motor Vehicles Act." Their effect is that Section 16 is a law unto itself, irrespective of what is contained in the Ordinance or in the Motor Vehicles Act. It follows, that, for the

purpose of grant of temporary permits the only provision that can be looked into is Section 16 itself and, once an operator is entitled to a temporary permit, it will be granted to him under the provisions of the Motor Vehicles Act. It is only for such a limited purpose that the Motor Vehicles Act, will come in and not for any other consideration. Also, we notice that, in order to get the entitlement, three factors have got to be satisfied. They are : (1) The claimant must be a stage carriage operator or contract carriage operator; (2) He must be running a stage carriage or a contract carriage in the State; (3) The stage carriage, in respect of which a temporary permit is claimed, must be one liable to be acquired under the Ordinance. It is not stated in section J6 that the stage carriage for which a temporary permit can be given, should be one which is running. Not running any stage carriage is in respect of the operator who claims a temporary permit and not in respect of a stage carriage. Provided the three requirements are satisfied, a stage carriage, whether it is running or not, will be entitled to a temporary permit.

After this Order was pronounced on 8th February, 1973, the proviso to Section 16 was introduced in the following terms : -

Provided that nothing contained in this section shall entitle any stage carriage operator or contract carriage operator to obtain any temporary permit in respect of any area or route or portion thereof specified in a scheme published at any time (whether before, on or after the 14th January, 1973) u/s 68-C of the Motor Vehicles Act.

This is the only substantial difference between the impugned Ordinance and the Bill which subsequently became law. In our view, the proviso now added in the Act and the main part of Clause 16 when read together cannot affect the view expressed by us in the batch of writ petitions referred to above.

97. We have considered the attack both by the operator and the financier on the several provisions of the impugned Ordinance. The subject of the attack is on almost all the provisions and we sustained the attack on the provisions both from the point of view of the financier, as also that of the operator. In dealing with the attack by the financier we have held that the financier under the hire-purchase agreement, who is a real owner, has been totally ignored, that his right to seize the vehicle, on default of payment of instalments by the hirer and sell the same to realise his dues, has been seriously curtailed and that under the provisions relating to compensation the financier does not get the money advanced by him in terms of the hire-purchase agreement. In dealing with the attack of the operator we held that the interim provisions substantially curtail his rights and the vehicle is sought to be acquired by the State for a sum fixed by them without his having any say in the matter. In effect, we have struck down most of the provisions, and the remaining provisions, are dependent upon the provisions which we have held to be unconstitutional and which are so inextricably connected with the provisions struck down. We are opinion that no part of the enactment could be saved.

98. We shall now summarise our conclusions on the several questions raised:

(1) Clause 4 of the Ordinance in so far as it vests in the Government the vehicles on notification free of all encumbrances inclusive of the hire-purchase agreements is void for the reason that the real owner under the hire-purchase agreement has been totally ignored.

(2) In enacting the impugned Ordinance the position of the financier or the hirer has not been properly envisaged.

(3) The interim provisions viz., Clauses 14 to 17, as to the rights of the financier under the hire purchase agreement to seize the vehicle covered by the agreement for default in payment of future instalments and for preventing the financier from bringing the vehicle to sale and compelling the financier to sell the vehicle only to the Government in accordance with the provisions contained in Schedule I, are void.

(4) From the point of view of the operator the interim provisions precluding him from selling the vehicle to any one of his choice at a competitive price are invalid.

(5) Further the other provisions relating to the issue of temporary permits and other interim arrangements also curtail his rights.

(6) The provisions relating to payment of compensation affect both the operator and the financier seriously.

(7) Clause 31 in seeking to override the provisions of the Central enactments, namely, the Motor Vehicles Act, the Hire Purchase Act, etc., is void.

(8) The declaration made under Clause (2) of the Ordinance is open to scrutiny by Courts as to whether the Articles referred to are attracted.

(9) The motor vehicles, its accessories, the workshop etc., sought to be acquired under the Ordinance do not fall under the description "material resources" of the community contained in Article 39 (b) and further Article 39 (c) invoked on behalf of the Government is equally inapplicable.

(10) On the question whether the assent is valid or vitiated it is unnecessary to give a finding, as the Ordinance has been replaced by an Act.

(11) The provisions of the Ordinance are discriminatory and contravene Article 14.

(12) The provisions of the Ordinance impose unreasonable restrictions upon the operator's right to carry on a trade or business and are not saved under Article 19 (6).

(13) There is no public purpose justifying compulsory acquisition of the motor vehicles.

(14) The provisions of the Ordinance contravene Article 31 (2).

(15) The State cannot rely upon Article 350 of the Constitution of India as the impugned enactment does not relate to a matter falling under Entry I of List I of Schedule VII of the Constitution.

99. The result is : we strike down the provisions of Ordinance I of 1973 and Madras Act XII of 1973 which replaced the Ordinance as being unconstitutional. The writ petitions are accordingly allowed with costs of Rs. 200 in each of the writ petitions forming part of this batch payable by the 1st Respondent.